

# Chapter 2

## Communication and Language as a Gendered Barrier to Accessing the Courts

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## I. Summary

Equal access to justice demands that the justice system: 1) transmit information to everyone in a way they can understand, and 2) receive information from everyone equally. Federal and state law require courts to provide spoken and sign language interpreters to ensure language access for individuals with Limited English Proficiency (LEP) and d/Deaf, Hard of Hearing or DeafBlind (D/HH/DB) individuals. Despite efforts by Washington courts, barriers remain for individuals whose primary language is not English and for those who are D/HH/DB. The consequences of not having an interpreter are serious, particularly in cases which involve domestic violence because the safety and wellbeing of the person and their children are at risk. Women (particularly Black, Indigenous, and women of color)<sup>1</sup> and LGBTQ+<sup>2</sup> individuals are disproportionately impacted by sexual violence and Intimate Partner Violence (IPV), indicating that communication barriers may be particularly dangerous for these populations.

Legal language is complex, which creates a barrier for individuals to fully understand and exercise their rights in police interrogations and in the courts. This is true for all people who have difficulty communicating in spoken English, but these barriers are amplified for people who experience access issues or discrimination on multiple fronts. For example, individuals who are D/HH/DB and foreign-born may encounter even greater barriers. Research shows that many immigrant women are more likely than U.S.-born women to have lower educational attainment, to work in low-wage service industry jobs with inflexible schedules, to live in poverty, or to experience domestic violence and sexual assault. All indications, based on available data, are that woman immigrants are impacted more by language barriers as they navigate multiple barriers to accessing the courts. Finally, prejudice and biases against certain forms of spoken English, including accents and vernacular, can jeopardize the right to a fair trial.

<sup>1</sup> The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report (“2021 Gender Justice Study Terminology, Methods, and Limitations”) for a more detailed explanation of terminology used throughout the report.

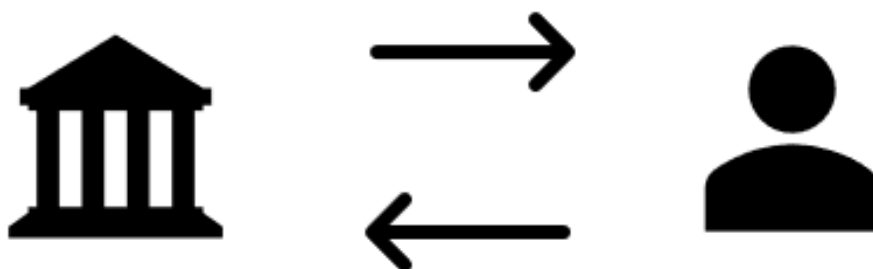
<sup>2</sup> Lesbian, gay, bisexual, transgender, queer, or questioning

Language access services, through professional interpretation of spoken communication and translation of documents; as well as the use of bilingual and multilingual court personnel, lawyers, and others, is integral to court operations and services, and necessary to a functional and fair justice system.

## II. Introduction

Communication and understanding require participation by at least two parties: the one transmitting the message, and the one receiving the message. Equal access to justice demands that the justice system both transmit information to everyone in a way they can understand and receive information from everyone equally.

Figure 1: Communication Moves in Two Directions



Under the first arrow in Figure 1, members of the judicial system may encounter barriers to communicating effectively with individuals with LEP or D/HH/DB individuals. These communications are difficult partly because legal language is hard for most people to understand.<sup>3</sup> Any person without specialized training or education in the law could have difficulty understanding the language used commonly by law enforcement, lawyers, courtroom staff, judges, and others. Specific examples of instances where language or communication barriers may arise include, but are not limited to:

<sup>3</sup> Joseph Wszalek, *Ethical and Legal Concerns Associated With the Comprehension of Legal Language and Concepts*, 8 *AJOB NEUROSCIENCE* 26 (2017).

- Courts communicating information to self-represented (pro se) litigants regarding complex court procedures.
- Courts sharing court policies, procedures, and services on their website in English, but not always in languages other than English and in alternate formats.
- Court services such as clerk's offices, communicating with persons with disabilities.
- Law enforcement communicating with LEP persons where they do not share a language.

Under the second arrow, as individuals try to communicate within the judicial system, they may encounter barriers, biases, or discrimination based on the way they communicate. Examples include, but are not limited to:

- Pro-se individuals navigating the civil legal system, including finding and filling out forms and documents and communicating with court staff.
- Giving testimony as a witness or as another participant, including through an interpreter, in court proceedings.

The following populations could be more vulnerable to barriers in communication and language access within the legal system:

- People with LEP
- People who are D/HH/DB
- People with a disability that limits functional speech, such as people with specific verbal or written language limitations, such as cognitive disabilities, low English literacy, or traumatic brain injury
- People who speak with non-English native accents, regional accents, or regional or cultural vernacular forms of English
- Youth

In each of these categories, a person might face additional barriers if they belong to groups that are marginalized because of gender, sexual orientation, race/ethnicity, class, education,

disability, and more. The burden of reducing barriers to communication should lie with the justice system, not with individuals. This chapter outlines communication barriers that can impact people of all genders, but highlights times when those barriers disproportionately impact or are amplified for some genders. In many cases there is a lack of research or data on the intersection with gender, and those gaps are highlighted throughout the chapter as well. There is a notable lack of literature on communication barriers to the courts for transgender, gender nonbinary, and gender-nonconforming individuals. However transgender, gender nonbinary, and gender non-conforming LEP and D/HH/DB individuals likely experience an amplification of the barriers outlined in this chapter when these barriers intersect with bias and discrimination in the courtroom as outlined in “Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community.”

### III. Individuals with Limited English Proficiency (LEP)

A person with limited English proficiency is one who speaks a language other than English as their primary language and who has a limited ability to read, write, speak, or understand English.<sup>4</sup> The Washington State Office of Financial Management (OFM) estimated in 2016 that Washington State had a population with LEP of over 650,000 individuals, or about nine percent of the state population (though this only takes into account the 45 most commonly spoken languages; the real number is probably higher).<sup>5</sup> In Washington State the number of people who have LEP has been increasing, and so has the number of languages spoken.<sup>6</sup> The Washington State Office of Superintendent of Public Instruction (OSPI) reported that 234 languages were spoken by English

<sup>4</sup> COMMONLY ASKED QUESTIONS AND ANSWERS REGARDING LIMITED ENGLISH PROFICIENT (LEP) INDIVIDUALS (2011), [https://www.lep.gov/sites/lep/files/media/document/2020-03/042511\\_QA\\_LEP\\_General\\_0.pdf](https://www.lep.gov/sites/lep/files/media/document/2020-03/042511_QA_LEP_General_0.pdf).

<sup>5</sup> *Estimate of Population with Limited English Proficiency (LEP) for the State and Counties*, OFF. OF FIN. MGMT. (2019), <https://ofm.wa.gov/washington-data-research/population-demographics/population-estimates/special-subject-estimates>. The OFM uses data from OSPI, the US Census, and TANF/Medicaid/SNAP. For methodology, see OFF. OF FIN. MGMT, LIMITED ENGLISH PROFICIENCY POPULATION ESTIMATE METHODOLOGY [https://ofm.wa.gov/sites/default/files/public/legacy/pop/subject/ofm\\_pop\\_limited\\_english\\_proficiency\\_methodology.pdf](https://ofm.wa.gov/sites/default/files/public/legacy/pop/subject/ofm_pop_limited_english_proficiency_methodology.pdf). Denominator for population percentage is from the 2016 U.S. Census American Community Survey.

<sup>6</sup> CHHANDASI PANDYA, MARGIE MCHUGH & JEANNE BATALOVA, LIMITED ENGLISH PROFICIENT INDIVIDUALS IN THE UNITED STATES: NUMBER, SHARE, GROWTH, AND LINGUISTIC DIVERSITY 12 (2011).

language learner students during the 2017-2018 school year.<sup>7</sup> In 2019 in Washington, 109 languages were reported to the Washington State Administrative Office of the Courts (AOC)-managed Court Interpreter Reimbursement Program indicating Washington courts have encountered individuals in at least that many languages.<sup>8</sup>

The most common languages spoken in Washington State after English, in order of frequency of encounters by courts in the reimbursement program, are: Spanish, Russian, Vietnamese, Arabic, Mandarin, Korean, Somali, Punjabi, Chuukese, Amharic, Samoan, Tagalog, Filipino, Mam, Cantonese, Swahili, Khmer, Farsi, Tigrinya, Romanian, French, Laotian, Hindi, Mixteco, Thai, Mongolian, Ukrainian, Burmese, Armenian, Marshellese, Oromo, Japanese, Portuguese, Kosraean, Nepali, Quiche, Soninke, Bosnian, Wolof, Polish, Mandinka, Ilokano, and Nuer. There are many more languages spoken by residents in Washington, but this list is illustrative of the point: Washington courts must prepare for encountering individuals speaking languages from around the world, including Indigenous languages.

It is not enough to identify languages by only counting those who have received interpreter services, since many times when language services are not available to aid in communicating their need, people will be left out of this method of identifying who is in that community and what languages they speak. In addition to tracking the languages spoken by those accessing services, it is important also to analyze data from multiple sources, including the U.S Census, American Communities Survey, and state and local governmental programs to get an accurate picture. This is because some language data sources, such as the U.S. Census, group languages into large language groups, therefore losing the richness of the diversity of languages. An example of this is within the Asian American, Native Hawaiian, and Pacific Islander (AANHPI) communities in Washington State, where people from 42 different nations speaking over 100

<sup>7</sup> PATTY FINNEGAN, MEA MOORE & KATIE WEAVER RANDALL, UPDATE: TRANSITIONAL BILINGUAL INSTRUCTION PROGRAM (TBIP) REPORT TO THE LEGISLATURE 15 (2019),

<https://www.k12.wa.us/sites/default/files/public/migrantbilingual/pubdocs/ADA-2019-02-UPDATE-TBIP.pdf>.

<sup>8</sup> Data from Administrative Office of the Courts, Languages Reported to the Court Interpreter Reimbursement Program (2019). While this dataset only captures data from about 44 courts, those courts are well-distributed across the Washington, suggesting that the number of languages represented captures nearly all the languages we see in courts in Washington.

different languages and 1,000 different dialects are present.<sup>9</sup> This language diversity data is lost when we rely on a single source of data, such as the U.S. Census, and doing so leaves our courts unprepared to meet the language needs of all Washingtonians.

## A. Federal law

People with LEP have an implied right to an interpreter in criminal proceedings through the Fifth, Sixth, and Fourteenth Amendments' guaranteed right to a fair trial, right to be present at trial, right to confront witnesses, right to effective assistance of counsel, and the right to due process.<sup>10</sup> For example, courts have found fundamental fairness provided by the Sixth Amendment required the litigant to be present at trial and denial of interpreter services equated to denial of the defendant's "presence."<sup>11</sup>

Non-discrimination protections in Title VI of the Civil Rights Act of 1964, (Title VI) and the Omnibus Crime Control and Safe Streets Act of 1968, provide that no person shall "on the ground of race, color or national origin, be excluded from participation in, denied benefits of, or subject to discrimination under any program...receiving Federal" financial assistance.<sup>12</sup> The non-discrimination protections apply to courts and court related services receiving federal funding.<sup>13</sup> Additionally, the services are prohibited from being administered in such a fashion as to effect subjecting recipients to discrimination based on national origin.<sup>14</sup> The Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974) interpreted regulations to hold that Title VI prohibits conduct that has a disproportionate effect on persons with LEP because such conduct constitutes national origin discrimination. In *Lau*, a school district was required to take reasonable steps to provide

<sup>9</sup> WASH. STATE COMM'N ON ASIAN PAC. AM. AFFS. (2019), <https://capaa.wa.gov/?s=42+different>.

<sup>10</sup> AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN COURTS 22 (2012), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_standards\\_for\\_language\\_access\\_proposal.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf).

<sup>11</sup> See *State v. Gonzalez-Morales*, 138 Wn.2d 374, 377, 979 P2d 826 (1999). See *United States ex rel. Negron v. State*, 434 F.2d 386, 389 (2d Cir. 1970).

<sup>12</sup> 34 U.S.C. § 10228 (c)(1).

<sup>13</sup> AM. BAR ASS'N, *supra* note 10, at 24.

<sup>14</sup> See 28 C.R.F. §§ 42.104(b)(2), 42.203(e).



students of Chinese origin, who had LEP, with a meaningful opportunity to participate in educational programs.

Additionally, in 2000, Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” was issued to require federal agencies to publish guidance on how recipients of federal assistance from the agency will provide meaningful access to persons with LEP. Pursuant to Executive Order 13166, the U.S. Department of Justice (DOJ) issued, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,”<sup>15</sup> acknowledging the use of qualified interpreter services in legal proceedings. In 2010, DOJ issued what is known as the “Courts Letter,” indicating DOJ’s position that Title VI requires the delivery of free, timely, qualified interpreter services in all legal proceedings, criminal or civil, and in interactions inside and outside of the courtroom.<sup>16</sup>

While much of the legal focus regarding LEP language access focuses on access to interpretation **in** the courtroom, the DOJ notes that individuals with LEP need access to language services in additional contexts, including when interacting with clerks’ offices; at self-help centers; reading signage; accessing court websites; and in interactions with court-appointed counsel, psychologists, mediators, Guardian ad litem (GALs) and Court Appointed Special Advocates (CASAs),<sup>17</sup> and other court personnel.<sup>18</sup>

<sup>15</sup> 67 Fed. Reg. at 41455 (2002).

<sup>16</sup> Thomas E. Perez, *Language Access Guidance Letter to State Courts from Assistant Attorney General Thomas E. Perez*, LIMITED ENGLISH PROFICIENCY (Aug. 16, 2010), [https://www.lep.gov/final\\_courts\\_ltr\\_081610.pdf](https://www.lep.gov/final_courts_ltr_081610.pdf).

<sup>17</sup> “Court Appointed Special Advocates (CASAs) and Guardians Ad Litem (GALs) are appointed by judges to represent children’s best interests in child abuse and neglect cases. CASAs are trained volunteers; GALs may be attorneys or trained volunteers.” *CASAs and GALs*, Child Welfare Info. Gateway, U.S. Dep’t of Health & Hum. Servs., <https://www.childwelfare.gov/topics/systemwide/courts/specialissues/casa-gal/>. A GAL can be paid or serve as a volunteer GAL, and most volunteer GALs serve as CASAs in dependency actions. *Guardian ad Litem (GAL)*, WASH. CTS., [https://www.courts.wa.gov/committee/?fa=committee.display&item\\_id=314&committee\\_id=105](https://www.courts.wa.gov/committee/?fa=committee.display&item_id=314&committee_id=105).

<sup>18</sup> U.S. DEP’T OF JUST., LANGUAGE ACCESS IN STATE COURTS (2016).

## B. Washington State law

The Washington State Law Against Discrimination (WLAD) provides a right to be free from discrimination because of national origin. WLAD includes the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.<sup>19</sup> Government offices are places of public accommodation.<sup>20</sup>

In addition to the WLAD, Washington State Law provides specific legal authority for the delivery of interpreter services in the court context to individuals with LEP under chapter 2.43 RCW. Washington State secures the rights of non-English speaking persons to full protection in legal proceedings through the assistance of a qualified interpreter.<sup>21</sup> Every non-English-speaking person in a legal proceeding is entitled to the services of a court-appointed, qualified interpreter.<sup>22</sup> A non-English speaking person is defined as a person “who cannot readily speak or understand the English language.”<sup>23</sup> During a legal proceeding, a judge is to appoint a qualified interpreter in the following situations:

[W]hen a non-English-Speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority.<sup>24</sup>

The right to a qualified interpreter may not be waived unless the person with LEP requests a waiver and the appointing authority determines on the record that the waiver was made knowingly, voluntarily, and intelligently.<sup>25</sup> While not binding on Washington courts, it is

<sup>19</sup>RCW 49.60.030.

<sup>20</sup> See WASH. STATE OFF. OF THE ATT’Y GEN., CIVIL RIGHTS RESOURCE GUIDE 22 (2015), <https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/CRR-Guide.pdf>.

<sup>21</sup> RCW 2.43.10.

<sup>22</sup> RCW 2.43.030.

<sup>23</sup> RCW 2.43.020.

<sup>24</sup> RCW 2.43.030(b).

<sup>25</sup> RCW 2.43.060.

instructive to know that the 10<sup>th</sup> Circuit Court of Appeals found that waiver of interpreter services is not a decision for the LEP defendant's attorney or the court: it is the defendant's decision alone.<sup>26</sup>

Washington State has invested in interpreter services for courts through the following efforts: 1) the work of the AOC court interpreter program, which oversees the certification of court interpreters for spoken languages;<sup>27</sup> 2) the Washington State Interpreter Commission with a mission to "ensure equal access to justice and to support the courts in providing access to court services and programs for all individuals regardless of their ability to communicate in the spoken English language";<sup>28</sup> and 3) through local court efforts including language access plans and specialized interpreter services departments providing litigants with interpreters throughout the process. However, these systems vary by court.

For individuals with LEP, RCW 2.43.030 requires courts to appoint a certified or qualified spoken language interpreter to assist the person throughout the proceeding. Washington State's AOC has been a leader in ensuring interpreters working in the courts are qualified to do so. Washington AOC's Interpreter Program oversees testing and certification of spoken language interpreters qualified to work in Washington courts, provides some training to interpreters seeking court credentials, and provides training to judicial officers.<sup>29</sup>

Additionally, the State Legislature enacted RCW 2.43.090 in 2008, which required all trial courts in the State of Washington to, "develop a written language assistance plan to provide a framework for the provision of interpreter services for non-English-speaking persons accessing the court system in both civil and criminal legal matters."<sup>30</sup> In regard to the provision of

<sup>26</sup> *United States v. Osuna*, 189 F.3d 1289 (10th Cir. 1999).

<sup>27</sup> *Washington State Court Interpreter Program*, WASH. CTS., [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret](https://www.courts.wa.gov/programs_orgs/pos_interpret).

<sup>28</sup> *Interpreter Commission*, WASH. CTS., [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=interpreterCommission](https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=interpreterCommission).

<sup>29</sup> *Washington State Court Interpreter Program*, WASH. CTS., [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret](https://www.courts.wa.gov/programs_orgs/pos_interpret).

<sup>30</sup> RCW 2.43.090(1).

interpreter services for court services, hearings, or court-managed programs, the language assistance plans must contain, at a minimum, procedures addressing the following:

- Identification and assessment of the language needs of non-English-speaking persons;
- Process for the appointment of interpreters on behalf of those parties;
- Notification to court users of the right to and availability of interpreter services prominently displayed in the courthouse in the five foreign languages that U.S. Census data indicates are predominate in the jurisdiction;
- The court's process for providing timely communication with non-English speakers by all court employees who have regular contact with the public, and meaningful access to court services, including access to services provided by the clerk's office;
- Procedures for evaluating the need for translation of written materials, prioritizing those translation needs, and translating the highest priority materials (taking into account the frequency of use of forms by the language group, and the cost of orally interpreting the forms);
- The provision of training to judges, court clerks, and other court staff on the requirements of the language assistance plan and how to effectively access and work with interpreters; and
- A process for ongoing evaluation of the language assistance plan and monitoring of the implementation of the language assistance plan.

Section 2 of the above cited statute requires that each court, when developing its language assistance plan, consult with judges, court administrators and court clerks, interpreters, and members of the community, such as domestic violence organizations, pro bono programs, courthouse facilitators, legal services programs, and/or other community groups whose members speak a language other than English.

Not all courts have created language access plans, despite the requirement in RCW 2.43.090; and some courts that have adopted language access plans have not updated them since 2009.<sup>31</sup> In an effort to assist courts in adopting or updating their language access plans, in 2017, the AOC and the Supreme Court Interpreter Commission released an updated guidance document about language access plan policies, requirements, and procedures. Entitled “Deskbook on Language Access in Washington Courts,”<sup>32</sup> it provides guidance for courts to create and implement their policies and procedures according to the listed requirements in statute (See RCW 2.43.090(1)(a)-(g)). The Deskbook also contains a model language access plan template for courts to use to notify the public of the court’s procedures for providing language access services. The specific nature of how services are provided varies from county to county, especially during the COVID-19 pandemic in which there are more proceedings in which interpreters are situated remotely. Both in the short-term, and for those courts planning to retain remote hearings and remote interpreter services in some fashion, courts will need to update their plans to reflect those service changes.

In addition to these state laws, Washington State has undertaken various efforts aimed at improving access to services for LEP individuals. Among those efforts is the 2017 Executive Order, “Reaffirming Washington’s Commitment to Tolerance, Diversity, and Inclusiveness,” wherein Governor Inslee reaffirms the right to be free from discrimination based on race, color, and national origin and acknowledges the positive impact that immigrants have on our state. The Executive order notes, “one in every seven people in this state are immigrants,” and immigrants “...are an integral part of our communities and workforce.”<sup>33</sup> In 2020, Governor Inslee adopted

<sup>31</sup> National data suggest that there may be geographic disparities in development of language access plans. A 2006 national survey of 158 courts conducted by The National Center for State Courts found almost 60% of courts in population centers had a language assistance plan, while only 26% of courts in rural areas had such a plan. BRENDA K. UEKERT ET AL., THE NAT’L CTR. FOR STATE CTS., SERVING LIMITED ENGLISH PROFICIENT (LEP) BATTERED WOMEN: A NATIONAL SURVEY OF THE COURTS’ CAPACITY TO PROVIDE PROTECTION ORDERS 4 (2006), <https://www.ojp.gov/pdffiles1/nij/grants/216072.pdf>.

<sup>32</sup> ADMIN. OFF. OF THE CTS., WASH. CTS., DESKBOOK ON LANGUAGE ACCESS IN WASHINGTON COURTS (2017), [http://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/content/pdf/StateLAP.pdf](http://www.courts.wa.gov/programs_orgs/pos_interpret/content/pdf/StateLAP.pdf).

<sup>33</sup> Exec. Order No. 17-01, Governor Jay Inslee (2017). According to the Migration Policy Institute, in 2019, Washington’s immigrant population was approximately 1,133,000, or 14.9% of the total population, with slightly over half (51.9%) listed as female. *Immigrant Population by State, 1990-Present*, MIGRATION POL’Y INST. (2019), <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present>. The U.S. Census Bureau reported similar demographic data for 2019, estimating 14.9% of Washington State residents, or 1,132,834 residents, are foreign born. *Selected Social Characteristics in the United States*, U.S CENSUS BUREAU (2021), <https://data.census.gov/cedsci/table?q=washington%20foreign%20born%20&g=0400000US53&tid=ACSDP1Y2019>.

the “Washington State Novel Coronavirus (COVID-19) Response Language Access Plan,” acknowledging our “obligation to communicate in ways that are accessible and culturally-and linguistically relevant.”<sup>34</sup> Within the COVID-19 Response Language Access Plan, Governor Inslee reiterates the requirement that state agencies are expected to provide “language assistance services, including translated materials.”<sup>35</sup>

### C. The interaction of communication barriers, immigration, and gender

The interaction of court access, including language access, with matters impacting gender and immigration is complex. The Migration Policy Institute (MPI) reports that while immigrants to the U.S. from Mexico and Central America are more likely to be male, immigrants from the Caribbean, South America, Asia, and Europe are more likely to be female. They report that female immigrant flows from the Philippines, Dominican Republic, China, and Nigeria to the U.S. have been increasing, which might raise the demand for less common languages spoken by populations in these countries, particularly those from rural and Indigenous communities.<sup>36</sup>

In addition to language barriers, female immigrants face additional factors that may lead to disparities in access to the courts. The MPI reports that immigrant women are more likely than native-born women to have lower education attainment, which could make it harder to access written translations of court documents and forms. Also, immigrant women are more likely than U.S.-born women to work in low-wage service industry jobs and to be living in poverty.<sup>37</sup> The National Women’s Law Center notes that jobs in the service sector often use last-minute, inflexible scheduling and give workers little or no control over their work schedules.<sup>38</sup> These

DP02&hidePreview=true. Between 2000 and 2017, the U.S. experienced a 72.5% population increase in foreign-born individuals, as compared to only a 20.2% increase for U.S.-born individuals. Evidently, immigrant populations have increased significantly over the last 20 years. *Washington: Demographics & Social*, MIGRATION POL’Y INST. (2019), <https://www.migrationpolicy.org/data/state-profiles/state/demographics/WA>.

<sup>34</sup> WASHINGTON STATE NOVEL CORONAVIRUS (COVID-19) RESPONSE LANGUAGE ACCESS PLAN (2020). [https://www.coronavirus.wa.gov/sites/default/files/2020-06/LanguageAccessPlan\\_0.pdf](https://www.coronavirus.wa.gov/sites/default/files/2020-06/LanguageAccessPlan_0.pdf).

<sup>35</sup> *Id.*

<sup>36</sup> JEANNE BATALOVA, IMMIGRANT WOMEN AND GIRLS IN THE UNITED STATES IN 2018 11 (2020), <https://www.migrationpolicy.org/article/immigrant-women-and-girls-united-states-2018>.

<sup>37</sup> *Id.*

<sup>38</sup> LIZ WATSON, LAUREN FROHLICH & ELIZABETH JOHNSTON, COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW-WAGE JOBS AND THEIR CONSEQUENCES (2014), [https://www.nwlc.org/sites/default/files/pdfs/collateral\\_damage\\_scheduling\\_fact\\_sheet.pdf](https://www.nwlc.org/sites/default/files/pdfs/collateral_damage_scheduling_fact_sheet.pdf).

factors may create financial and time barriers to accessing the courts, as will be discussed below. See also “Chapter 1: Gender and Financial Barriers to Accessing the Courts” for more on the financial barriers to accessing the courts.

Research also shows that immigrant women experience higher rates of domestic and sexual violence compared to U.S.-born women.<sup>39</sup> The elevated rate of domestic and sexual violence among immigrant women, communication barriers that some immigrant women face as described throughout this chapter, and unique barriers to reporting experienced by immigrant women (e.g., fear of deportation<sup>40</sup>) likely amplify disparities in court access for immigrant women. See “Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence” for further analysis on the intersection of immigration status and gender-based violence. The findings in Chapter 8 also show that women, particularly Black, Indigenous and women of color, and LGBTQ+ individuals are disproportionately impacted by sexual violence and IPV. This continues to paint a picture of cumulation of inequities for people with multiple marginalized identities.

#### D. Financial barriers

Under Washington law, courts must appoint an interpreter for litigants who are LEP in both civil and criminal matters; however, payment for the interpreter services is a separate issue. Under RCW 2.43.040, when a litigant initiates a legal matter, as is the case in many civil cases, the court may make the litigant pay for the cost of the interpreter services unless the litigant is indigent. This is known as a fee waiver or “in forma pauperis” process under RCW 2.43.040. However, this has been found to be unconstitutional by Washington case law. In *State v. Marintorres*, the defendant successfully challenged an assessment of the costs of his Spanish-speaking interpreter under RCW 2.43.040(4) and 10.01.160(2) on equal protection grounds.<sup>41</sup> He noted that chapter 2.42 RCW, which deals with providing interpreters for hearing impaired parties, requires the

<sup>39</sup> *SART Toolkit Section 6.12*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/sarts/toolkit/6-12>.

Bushra Sabri et al., *Intimate Partner Homicides in the United States, 2003-2013: A Comparison of Immigrants and Nonimmigrant Victims*, 36 J. INTERPERSONAL VIOLENCE 4735, 4735 (2018).

<sup>40</sup> TAHIRIH, IMMIGRANT SURVIVORS FEAR REPORTING VIOLENCE (2019), <https://www.tahirih.org/wp-content/uploads/2019/06/2019-Advocate-Survey-Final.pdf>.

<sup>41</sup> 93 Wn. App. 442, 451–52, 969 P.2d 501 (1999).

county to appoint and pay for a qualified interpreter without any provision that the expense of the interpreter is a taxable cost. The *Marintorres* court agreed that there was a violation of equal protection, reasoning that this distinction in the treatment of hearing-impaired and non-English speaking criminal defendants could not satisfy even “rational basis” review.<sup>42</sup>

This practice of charging non-indigent LEP litigants the cost of interpreter services also conflicts with federal DOJ guidance that such practices violate Title VI requirements to provide free interpreter services. Long standing DOJ policy directives advise state courts which are recipients of federal financial assistance that imposing fees on LEP parties for interpreter services to allow them to access court hearings and services violates their Title VI obligation to provide meaningful access.<sup>43</sup> Because of this guidance, many courts have stopped using the fee waiver process for interpreter services. King County Superior Court was investigated by DOJ for this practice and has since stopped using the fee waiver process for court interpreter costs.<sup>44</sup> Not all courts have abandoned the fee waiver process, however, and the differing practices around the state lead to confusion and create barriers for LEP individuals. At least one county Superior Court takes the position that RCW 2.43.040 (3) directs the court to charge for civil case interpretation costs and it does not have the authority to waive the charge, even in the face of a federal policy prohibiting the recipient from doing so if the recipient receives Title VI or Safe Streets Act funding. This puts courts in a quandary: either 1) comply with their interpretation of RCW 2.43.040 (3) and charge for civil case interpretation, which risks a chilling effect on LEP persons who need protection orders and a risk to federal funds impacting other court programs as well as county programs funded from the same federal grant, or 2) provide free interpreter services for civil cases and risk being out of compliance with the statute. See “Chapter 1: Gender and Financial Barriers to Accessing the Courts” for more information on the populations who are most impacted by poverty, and the barriers to court created by court user fees including: women (particularly Black,

<sup>42</sup> *Id.* at 451; *State v. Diaz-Farias*, 191 Wn. App. 512, 526–27, 362 P.3d 322 (2015).

<sup>43</sup> U.S. DEP’T OF JUST., CIV. RTS. DIV., COMMUNICATION WITH COURTS REGARDING LANGUAGE ACCESS, <https://www.justice.gov/file/1250731/download>.

<sup>44</sup> J. MICHAEL DIAZ, RE: LETTER OF RESOLUTION - REVIEW OF INTERPRETIVE SERVICES IN KING COUNTY SUPERIOR COURT; DOJ # 171-82-22 (2015), [https://www.lep.gov/sites/lep/files/resources/20151201\\_KCSC\\_Letter\\_of\\_Resolution.pdf](https://www.lep.gov/sites/lep/files/resources/20151201_KCSC_Letter_of_Resolution.pdf).



Indigenous and women of color), and transgender, non-binary, and gender non-conforming individuals.

### E. Limited access to spoken language interpreters

The limited availability of court certified or registered spoken language interpreters in some languages and areas of the state may be a barrier to providing timely access to legal proceedings for individuals with LEP. If a court does not have an interpreter qualified in a given language in their county or in a nearby county, they will need to bring an interpreter in from another area of the state.<sup>45</sup> This can lead to a delay in accessing courts.

Scheduling interpreters can be a challenge because of the way court calendars are organized. Members of the Washington State Supreme Court Interpreter Commission provided the following overview of this challenge, based on anecdotal experience: Courts generally schedule interpreters in two ways, either by calendaring the case on the usual docket and requesting the interpreter for the block of time likely needed, or by having a separate interpreter calendar where cases needing interpreter services are scheduled. Where the case is scheduled on the docket, and not on an interpreter calendar, courts tend to schedule interpreters for blocks of time. This requires some guess work around the likely length of time that a hearing will last. In the past, courts would call the cases that utilized interpreters at the start of the docket to ensure that the case could be heard before the interpreter had to leave. However, some courts no longer prioritize hearing cases with interpreters at the start of the docket. Thus, an interpreter scheduled for a two-hour time block at the beginning of the docket may leave before the litigant's case is called, requiring the case to be rescheduled. Cases scheduled on the "interpreter calendar," may experience a longer wait time to get to a hearing than their counterparts who do not need interpreter services.

Individuals with LEP seeking relief through "ex-parte" proceedings<sup>46</sup> may find the court unprepared to provide them with communication access services. By the nature of the hearing,

<sup>45</sup> *State v. Aljaffar*, 198 Wn. App. 75, 392 P.3d 1070 (2017).

<sup>46</sup> *Ex parte* proceedings are legal proceedings conducted without notice and the presence of other parties impacted by the proceeding. Generally, *ex parte* proceedings are allowed only when a party requires urgent relief that cannot wait until the opposing party is informed of such a request. See *Superior Court Statistical Reporting*

“ex-parte” proceedings are unscheduled. The difficulty for courts in these situations is providing timely interpreter services to allow access to litigants seeking relief, such as a Domestic Violence Protection Order. For spoken language services, courts can use telephonic interpreter services for these interactions, although it is recognized best practice to provide in-person interpreter services for evidentiary hearings.<sup>47</sup> Some courts also have on-site staff interpreters that may be available for unscheduled hearings, but many do not. Civil legal aid attorneys in Washington report advising pro se clients about seeking Domestic Violence Protection Orders, only to have the pro se party appear at “ex-parte” and the court not be able to communicate with them. An example of this is where, even when an advocate attempted to provide advance notice by calling the clerk’s office to alert them for the need for an interpreter, the response was that they could not request an interpreter without first having a case number for the matter. Meaning, the pro se individual needed to appear and file the case without an interpreter in order for the clerk to request an interpreter. Historically, if the individual has a Domestic Violence advocate with them, some courts rely on the advocate to interpret, even though they are not qualified to do so. This places advocates in a difficult position since the person they are advocating for needs the protection order and if they do not interpret, the hearing might be postponed. However, as a result of the passage of E2SHB 1320 during the 2021 Washington legislative session, courts will be making extensive changes to how LEP individuals seeking Domestic Violence Protection Orders will be able to access the courts, including: 1) translation of court forms in more languages, 2) the ready assignment of interpreters to victims in all aspects of the investigation and legal proceedings associated with their protection requests, and 3) the provision of private meeting spaces in court houses for victims and interpreters to meet with advocates and prosecutors.<sup>48</sup> The statute explicitly will not allow courts to have an advocate interpret for the client in a hearing, nor allow the same interpreter to interpret for both parties when not on the record.<sup>49</sup>

*Manual, WASH. CTS.,*

[https://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=stats\\_manual&file=ct1expar](https://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=stats_manual&file=ct1expar).

<sup>47</sup> See GR 11.3 Remote Interpretation

<sup>48</sup> ENGROSSED SECOND SUBSTITUTE H.B. 1320, 64th Leg., Reg. Sess. (Wash. 2015).

<sup>49</sup> *Id.*

Timely access to interpreting services is particularly challenging in the case of languages of lesser diffusion—those languages for which there are not many speakers in a given area or jurisdiction. Washington courts certify spoken-language court interpreters in 13 languages and registers interpreters in approximately 90 additional languages.<sup>50</sup> These credentials provide some information to judicial officers about the interpreter’s language and interpretation ability. Additionally, Washington courts have a searchable database of credentialed interpreters for these languages. However, as noted above, OSPI reports that 234 different home languages are represented in Washington’s public schools.<sup>51</sup> As the number of languages spoken at home by families and their children exceed the number of languages credentialed by the AOC, there exists the real world possibility that some court users who need interpretation into a language with no court-certified or registered interpreters available will experience delays in getting language access services while the courts seek individuals who can perform the language access assistance needed.

When a person with LEP comes in contact with the court and does not communicate in one of the registered or certified languages, courts struggle with finding an interpreter. A 2017 survey of Washington State courts’ experiences providing court interpreters found that, while Spanish was reported to be the most interpreted language in courts, over a third of courts surveyed reported providing interpreter services for more than ten different languages, “with one court reporting 162 languages.”<sup>52</sup> In the same survey, 59% of courts reported that they were often unable to get timely interpretation services, especially for languages of lesser diffusion. This was especially difficult in the case of jury trials or next day hearings. One-fifth (21%) of courts reported having used non-certified interpreters to fill the gap, a practice that jeopardizes LEP participants’

<sup>50</sup> *Registered Interpreters*, WASH. CTS. (2020), [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=registeredInterpreters](https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=registeredInterpreters); *Certified Interpreters*, WASH. CTS. (2020), [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=certifiedInterpreters](https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=certifiedInterpreters).

<sup>51</sup> FINNEGAN, MOORE & WEAVER RANDALL, *supra* note 7.

<sup>52</sup> JEANNE ENGLERT, FUNDING COURT INTERPRETERS: A SURVEY REPORT ON COURT INTERPRETER SERVICES AND FUNDING NEEDS IN WASHINGTON STATE (2018), [https://www.courts.wa.gov/programs\\_orgs/pos\\_bja/isftf/Funding%20Court%20Interpreters%202018.pdf](https://www.courts.wa.gov/programs_orgs/pos_bja/isftf/Funding%20Court%20Interpreters%202018.pdf).

understanding of proceedings, as an interpreter without certification may not have the specific legal vocabulary needed to convey the substance of the proceedings.<sup>53</sup>

As immigration patterns change, courts may receive more requests for specific languages that were not previously in as much demand in their jurisdiction. For example, in its language access plan, the Kitsap County Court identified the current highest need languages to be Spanish, Mam, American Sign Language (ASL), Kanjobal and Vietnamese; but noted that due to demographic shifts, future languages needed include Gujarati, Chuukese, and Swahili.<sup>54</sup> This can create a barrier for individuals with LEP as local courts work to identify appropriately qualified interpreters and establish contracts with them to bring them to court work. For languages in which there is no certification or registration process and directory, courts are left to identify individual interpreters on their own or through their networks. Therefore, immigrants and refugees who speak languages of lesser diffusion may face disparities in access to the legal system. LEP prevalence varies by language. While Spanish is the most common language spoken in Washington State after English, it is only spoken by 30% of Washington’s LEP population, followed by Chinese (Mandarin and Cantonese), Vietnamese, Korean, and Russian.<sup>55</sup> The Migration Policy Institute reports that 41.5% of Washington State’s foreign-born population has LEP.<sup>56</sup> As shown in Table 1, Vietnamese speakers have the highest proportion of LEP—in other words, nearly 60% of Washington residents who speak Vietnamese at home speak English less than ‘very well.’ Individuals from these language communities are more likely to face language barriers when accessing the courts:

**Table 1. Percent of LEP by Language Community, Washington State, 2018**

Language spoken at home	% of speakers LEP
Vietnamese	59.8%
Thai/Lao/Tai-Kadai languages	50.4%
Korean	49.4%

<sup>53</sup> *Id.*

<sup>54</sup> Kitsap County District Court, *Language Access Plan* (2018), <https://www.kitsapgov.com/dc/Documents/Kitsap%20District%20Court%20LAP%20DeskBook%202018.pdf>.

<sup>55</sup> PANDYA, MCHUG & BATALOVA, *supra* note 6.

<sup>56</sup> MIGRATION POLICY INSTITUTE, *Washington State Immigration Data Profile* (2020), <https://www.migrationpolicy.org/data/state-profiles/state/language/WA>.

Hmong	48.3%
Chinese (Mandarin and Cantonese)	47.6%
Amharic/Somali/Afro-Asiatic	45.3%
Khmer	44.4%
Russian	41.6%
Persian	40.2%
Arabic	38.6%

### Footnotes for Table 1:

Source: Data from 2018 American Community Survey, U.S. Census Bureau

The challenge in providing qualified interpreters is not restricted to languages of lesser diffusion, however. A nation-wide needs assessment by the National Center for State Courts (NCSC) noted that access to interpreters for criminal court cases was generally consistent, but much less consistent for civil court cases. The National Center for State Courts notes that the consequences of not having an interpreter could be particularly serious in civil cases which involve incidents of domestic violence, as “a full understanding of the scope of violence is critical to decisions in these cases, in which the safety and well-being of victims and children are potentially at risk.”<sup>57</sup> A 2018 survey of Washington domestic violence/sexual assault advocates revealed high unmet need for interpreters, with nearly a third of all advocates noting that it is “not easy” to obtain interpreter services in their court. Nearly half of respondents from majority-rural Region 2 counties responding that obtaining interpreter services was “not easy.”<sup>58</sup> They reported that when interpreters were not available, clients had to rely on non-certified interpreters, or wait for an interpreter to be found. In the instance of waiting for an interpreter, this can lead to a delay in accessing courts. In the instance of using non-certified interpreters, advocates note that inconsistencies or inaccuracies in interpreting in these contexts can have serious negative

<sup>57</sup> CTR. FOR CT. INNOVATION, EFFECTIVE COURT COMMUNICATION: ASSESSING THE NEED FOR LANGUAGE ACCESS SERVICES FOR LIMITED ENGLISH PROFICIENT LITIGANTS IN DOMESTIC VIOLENCE, SEXUAL ASSAULT, DATING VIOLENCE, AND STALKING CASES (2015), [https://www.courtinnovation.org/sites/default/files/documents/LEP%20Needs%20Assessment%20Report\\_FINAL.pdf](https://www.courtinnovation.org/sites/default/files/documents/LEP%20Needs%20Assessment%20Report_FINAL.pdf).

<sup>58</sup> JEANNE ENGLERT, FUNDING COURT INTERPRETER SERVICES IN WASHINGTON COURTS: A SUMMARY OF FEEDBACK ON COURT INTERPRETER SERVICES AND FUNDING NEEDS (2019), [https://www.courts.wa.gov/programs\\_orgs/pos\\_bja/isftf/Interpreter%20compiled%20feedback%20report%20final.pdf](https://www.courts.wa.gov/programs_orgs/pos_bja/isftf/Interpreter%20compiled%20feedback%20report%20final.pdf).

consequences for their clients.<sup>59</sup> However, even qualified and certified interpreters may struggle with sensitive material in some cases such as those concerning domestic violence or sexual assault, which might require challenging or sensitive vocabulary, have a higher need for confidentiality, and could result in experiences of vicarious trauma for the interpreter. Not all interpreters feel prepared to handle domestic violence or sexual assault cases, and training resources are provided to them to handle such types of proceedings.<sup>60</sup> Specialized training in these topics could help interpreters be more prepared for these challenging situations.<sup>61</sup> See “Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence” for more information on the gendered impacts of domestic violence and sexual assault. These are impacts that can be exacerbated for individuals with LEP.

Attorneys report that during the COVID-19 pandemic, access to interpreters in Washington State for communication with in-custody clients has become even more difficult, as there are few spaces large enough to accommodate three people socially distancing in jails and prisons, and most jail phone systems do not allow three-way calling for telephonic interpretation.<sup>62</sup> Access to interpreters has suffered in general during the pandemic, as only a quarter of surveyed defense attorneys agree that interpreters are as available during COVID-19 as they were before the pandemic.<sup>63</sup> In King County, “attorneys have often resorted to calling an interpreter and holding their phone or laptop up to the glass where they meet their clients in jail,” when interpreters are unavailable or unwilling, due to unsafe conditions, to physically enter the jail.<sup>64</sup>

There is reason to believe that limited access to interpreters may have a disproportionate impact on female court users. As noted previously, female immigrants are more likely than their native-

<sup>59</sup> *Id.*

<sup>60</sup> See Cristina Helmerichs, *Vicarious Trauma and Interpreters*, AM. TRANSLATORS ASS’N (Feb. 13, 2020), <http://www.ata-divisions.org/ID/vicarious-trauma-and-interpreters>; see also CLAC RESOURCE LIST FOR COURT INTERPRETER EDUCATION ON VICARIOUS TRAUMA (2017) <https://umtia.org/resources/Documents/2%20%20201705%20CLAC%20Vicarious%20Trauma%20Resources.pdf>.

<sup>61</sup> CTR. FOR CT. INNOVATION, *supra* note 57.

<sup>62</sup> KATRIN JOHNSON & JASON SCHWARTZ, *DEFENDING CLIENTS IN THE COVID-19 ENVIRONMENT: SURVEY RESULTS FROM PRIVATE AND PUBLIC DEFENSE COUNSEL* (2021) (a total of 296 defense attorneys from 34 counties in Washington State responded to a survey in December 2020 about the impact of COVID-19 on their work).

<sup>63</sup> *Id.* at 12.

<sup>64</sup> David Kroman, *COVID-19 Delays Justice for King County Inmates who Need Interpreters*, CROSSCUT (Nov. 18, 2020), <https://crosscut.com/news/2020/11/covid-19-delays-justice-king-county-inmates-who-need-interpreters>.

born peers to work low-wage, service sector jobs. The National Women’s Law Center notes that jobs in this industry often employ last-minute scheduling and give employees little flexibility or control over their work schedules.<sup>65</sup> For female court users needing an interpreter, delays or rescheduling of court hearings may be particularly problematic given the challenges they may face in making time to come to court.

## F. Assessment of need for language services

How do judges know if a person with LEP needs an interpreter? The American Bar Association (ABA) points out that the level of English proficiency needed for daily tasks is likely very different from the level of English proficiency needed for “meaningful participation in court proceedings.”<sup>66</sup> An individual may be able to respond to basic biographical questions, but struggle to understand legal terms and complex courtroom procedures, especially under what may be stressful conditions. Assessing language proficiency requires specialized training that most judges and courtroom staff do not possess. Because assessing language proficiency is a task that requires training in language acquisition and language proficiency assessment, training that is not typically within the purview of judges, attorneys, and court personnel, the American Bar Association recommends that people with LEP be allowed to self-identify as needing language access services and courts should presume a request for interpreter services is bona fide.<sup>67</sup> Washington State law does provide that LEP litigants may waive their right to an interpreter, only after the appointing authority determines, on the record, that the waiver has been made knowingly, voluntarily, and intelligently.<sup>68</sup>

## G. Interactions with court clerks and other personnel

Many of the interactions between litigants and parties and court personnel occur outside the courtroom, and in a variety of programs. People go to the court clerk to file pleadings, to initiate a court matter, to seek legal remedy or protections, and to respond to ongoing matters. One of the potential barriers for individuals with LEP in interacting with a court clerk is the unscheduled

<sup>65</sup> WATSON, FROHLICH & JOHNSTON, *supra* note 38.

<sup>66</sup> AM. BAR ASS’N, *supra* note 10.

<sup>67</sup> *Id.*

<sup>68</sup> RCW 2.43.060.

nature of those interactions. Even in courts with language access plans, those plans do not generally govern the operations of the clerk's office as they are independent from the operations of the court. The requirement to provide meaningful access to the services of a court clerk's office is clear. According to the DOJ:

...the meaningful access requirement extends to court functions that are conducted outside the courtroom. Examples of such court-managed offices, operations, and programs can include information counters; intake or filing offices; cashiers, and other similar offices, operations, and programs. Access to these points of public contact is essential to the fair administration of justice, especially for unrepresented LEP persons. DOJ expects courts to provide meaningful access for LEP persons to such court-operated or managed points of public contact in the judicial process, whether the contact at issue occurs inside or outside the courtroom.<sup>69</sup>

For example, the Pierce County Language Access Plan notes that when interpreters are not busy in courtroom proceedings, they may be available to assist in the clerk's office, but it's unclear what happens when someone needs to access the clerk's office otherwise.<sup>70</sup> It might be true that some courts work with the court clerk to establish procedures for how persons with LEP will access the functions of the clerk's office, but it is unclear how extensive those coordinated practices are in courts around Washington. Little is known about the interpreter services provided at clerks' offices, outside of anecdotal evidence that some offices use staff bilingual in English and Spanish, and that some court clerks' offices may have access to telephonic interpreter services to allow them to communicate with any person with LEP coming into their offices. Advocates report incidents around the state where LEP and d/Deaf pro se individuals, sometimes seeking Domestic Violence Protection Orders, are unable to communicate with the clerk's office when they attempt to file pleadings and schedule hearings.

<sup>69</sup> DEP'T OF JUST., COMMUNICATION WITH COURTS REGARDING LANGUAGE ACCESS, <https://www.justice.gov/file/1250731/download>.

<sup>70</sup> JOVI LEE, LANGUAGE ACCESS PLAN OF PIERCE COUNTY COURTS (2018), <https://www.co.pierce.wa.us/DocumentCenter/View/68593/2018-Language-Access-Plan---3-26-2018?bidId=>.



GALs or CASAs are commonly appointed in family law matters involving child custody determinations. They have the obligation to represent the best interests of the person for whom they are appointed. GALs are required to become informed about the facts of the case,<sup>71</sup> and to do so are often required to conduct interviews with relevant family members.<sup>72</sup> Communication barriers could impact the extent to which GALs are able to fully interview family members, negatively impacting the thoroughness of the final report or recommendation to the court, and the court may not be aware of the underlying barriers that may be influencing the accuracy of the report. Additionally, if only one party has LEP, such communication barriers could represent an important inequity in access to justice. To avoid this, the GAL must assess the level of English of the clients to determine whether an interpreter is needed and follow the steps to schedule an interpreter for needed interviews. Given the challenges in obtaining certified interpreters for courtroom procedures noted above, this could lead to delays in the process or even potentially fewer meetings with parties with LEP in order to meet court deadlines. State law allows for compensation to be provided to cover administrative costs associated with conducting a GAL investigation, which includes interpreter services for GALs.<sup>73</sup> Therefore, in order for a GAL to conduct a thorough investigation in cases where one or more parties have LEP, the GAL must be familiar with the process to work with an interpreter. However, the state GAL Guidebook does not once make mention of the use of interpreters or how GALs are to identify and communicate with families with LEP.<sup>74</sup> There is a lack of evidence regarding actual practice of GALs regarding clients with LEP statewide.

Additionally, the National Center for State Courts reports that many states note a need for language services in the office of the prosecutor, public defense, civil attorneys, and for court-ordered service providers. Court-ordered service providers responding to the survey from a 2013 nation-wide needs assessment reported receiving high numbers of LEP referrals and being unable

<sup>71</sup> GAL Rule 2(g).

<sup>72</sup> TITLE 26 FAMILY LAW GUARDIAN AD LITEM GUIDEBOOK 26 (2008), <https://www.courts.wa.gov/content/manuals/domViol/appendixE.pdf>.

<sup>73</sup> “Additional compensation may be allowed for other administrative costs, including . . . other services not provided by the guardian or limited guardian.” RCW 11.92.180. “Compensation will be fixed by the court.” *Id.*

<sup>74</sup> TITLE 26 FAMILY LAW GUARDIAN AD LITEM GUIDEBOOK, *supra* note 72.

to serve them.<sup>75</sup> Illustrative of the barriers in these settings is a 2021 settlement agreement between the DOJ and Whatcom County Public Defense and Whatcom County Sheriff's Office,<sup>76</sup> finding that both programs failed to provide appropriate interpreter services for a d/Deaf individual. While not directly applicable to LEP interpreter services, it is likely that the barriers identified in this settlement agreement are similar for LEP individuals.

## H. Court observers and family participation

In the context of language access services for LEP individuals, one category of individuals often overlooked is the court observer, including family and friends of a criminal defendant, who themselves are LEP. In criminal cases, it is not uncommon for a defendant or victim's family and friends to be present during trial or sentencing to observe the proceedings and support the defendant. Article 1, Section 10 of the State Constitution provides that:

[j]ustice in all cases shall be administered openly, and without unnecessary delay.”  
In *Allied Daily Newspapers of Wash. v. Eikenberry*, the Washington State Supreme Court further defined the open court mandate, saying, “We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.”<sup>77</sup>

This raises concerns regarding the policy of Washington Courts to be open courts when LEP individuals do not have access to be a court observer because courts do not generally provide interpreter services for LEP individuals in this capacity. Courts could take guidance for the provision of interpreter services to d/Deaf court observers, jurors, and companions of a litigant, even when that litigant is not d/Deaf or in need of interpreter services.

<sup>75</sup> CTR. FOR CT. INNOVATION, *supra* note 57.

<sup>76</sup> *DOJ and Whatcom County Resolve Multiple Complaints Regarding Violations of the Americans with Disabilities Act*, DEP'T OF JUST., U.S. ATT'YS OFF. (June 14, 2021), <https://www.justice.gov/usao-wdwa/pr/doj-and-whatcom-county-resolve-multiple-complaints-regarding-violations-americans>.

<sup>77</sup> *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

Washington State also requires courts to appoint credentialed interpreter services for LEP parents, guardians, and children involved in juvenile court proceedings and programs using the framework of chapter 2.43 RCW. RCW 13.04.043 directs that juvenile court administrators “shall obtain interpreters as needed consistent with the intent and practice of chapter 2.43 RCW, to enable non-English speaking youth and their families to participate in detention, probation, or court proceedings and programs.” In addition, RCW 12.40.080(8) provides that “The diversion unit shall, subject to available funds, be responsible for providing interpreters to effectively communicate during diversion unit hearings or negotiations. RCW 2.56.130 also requires the administrator for the courts to develop informational materials for non-English speaking youth and their families. These requirements, enacted in 1993, demonstrate Washington’s early recognition that communication in informational materials and outside the hearing itself, during diversion and negotiation, must be available for those who are LEP.

One area which remains unexamined is the inability of LEP individuals to serve as jurors in the State of Washington. In part, this is due to the eligibility requirements to be a juror, which include being able to communicate in English.<sup>78</sup> Because of this, currently interpreters are not provided for LEP individuals to allow them to participate as jurors. This has an impact then on the likelihood that an LEP defendant will have a jury of their peers.

## I. Monitoring and complaint system

Finally, the National Center for State Courts notes the need for procedures to monitor the quality of language services provided. Few jurisdictions have processes to collect feedback from consumers and stakeholders, and report that the system for filing complaints is often confusing and lacks follow-up.<sup>79</sup>

The Deskbook on Language Access in Washington Courts specifies that courts must provide information in the court’s plan about their complaint resolution procedures regarding the delivery of language access services to individuals needing interpreter or translation services. There are two types of complaints regarding language access services that the Interpreter

<sup>78</sup> RCW 2.36.070.

<sup>79</sup> CTR. FOR CT. INNOVATION, *supra* note 57.

Commission reviews. One is a complaint against an individual interpreter and another is a complaint against a court for failure to provide language access services. AOC staff assigned to the Interpreter Commission gather information from the complainant and will provide language access services to do so, such as translating the complaint form, complaint information, and conducting information gathering interviews using credentialed court interpreters whenever necessary or possible. The Interpreter Commission will refer complaints about the lack of language access services to the Commission's Issues Committee to review those complaints and, either resolve the matter by providing an advisory letter to the court in question, or refer it to the full Interpreter Commission for further review and action. This is an informal process whereby the Interpreter Commission may be involved in providing consultation and guidance to LEP parties and local courts in resolving and removing barriers to language access services and resources.<sup>80</sup>

Complaints filed with the Interpreter Commission or a local court against an individual interpreter can be filed by an individual or by a person who witnesses the actions of an interpreter that forms the basis of the complaint against the interpreter. Those types of complaints generally allege a violation of a provision of GR 11.2, the Code of Professional Conduct for Judiciary Interpreters,<sup>81</sup> and are referred to the Interpreter Commission's Disciplinary Committee for further action.<sup>82</sup>

Individuals with a complaint regarding an interpreter are encouraged to first consider talking to the interpreter to resolve the matter. In the event this does not resolve the matter, complainants are advised to next communicate their grievance to the court interpreter coordinator or court administrator, and the courts must make interpreter arrangements using a different interpreter to address the grievance. When a grievance against an interpreter is not resolved at the local

<sup>80</sup> Personal Communication with Interpreter Commission Staff and Members.

<sup>81</sup> GR 11.2, [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&ruleid=gagr11.2](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&ruleid=gagr11.2).

<sup>82</sup> Information about how to file a complaint against a spoken language interpreter can be found at: [https://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=sliComplaint](https://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=sliComplaint).

level, complainants are informed that they may file a complaint with the DOJ or the Interpreter Commission.<sup>83</sup>

A number of courts have submitted detailed procedural steps for filing a complaint with the court itself by identifying who the complaint is to be filed with, how to submit it, the court's timelines for reviewing and resolving the complaint, and the appeal process, if any. A small number of courts have provided complaint information and forms in Spanish and Russian languages. There is a variance among local courts in terms of the specific information that must be contained in the complaint; one municipal court encourages complainants to identify "the sections in the court's plan, statutes, or regulations alleged to have been violated and the time frame in which the lack of compliance is alleged to have occurred."<sup>84</sup> Where courts require or encourage complainants to cite a court policy, plan section, or written procedure that is alleged as having been violated, complainants who do not read English cannot access that information because it is not translated for their use.

All of the plans submitted to AOC do refer to the complaint resolution process offered by the Interpreter Commission and the Commission will hire interpreters to assist complainants in filing a grievance.

## J. Efforts to address disparities and recommendations

Courts across Washington State are taking steps to be more accessible to individuals with LEP, but progress is uneven. For example, 70% of courts surveyed in Washington provide forms translated into at least one language other than English; 52% provide multilingual signage; 36% provide interpreters for pro se litigants; and 26% provide interpreters for courtroom facilitators and court-mandated programs.<sup>85</sup> In a 2015 nation-wide needs assessment, the National Center for State Courts noted several innovations at the local level to increase language access to state courts: Washington, D.C. is prioritizing the hiring of bilingual court staff in high-need languages;

<sup>83</sup> *Spoken Language Interpreter Complaint Report*, WASH. CTS. (2020), [http://www.courts.wa.gov/programs\\_orgs/pos\\_interpret/index.cfm?fa=pos\\_interpret.display&fileName=sliComplaint](http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=sliComplaint).

<sup>84</sup> Language Access Plan of Lynnwood Municipal Court, submitted to the AOC on May 28, 2018.

<sup>85</sup> ENGLERT, *supra* note 52.

the King County Superior Court is making family law forms available online in several languages; and the Washington State courts are working with community-based organizations to ensure that interpreters have specialized training on topics such as gender-based violence.<sup>86</sup> The AOC Pattern Form Committee created bilingual Spanish/ English family law pleadings in the past; however, those forms are not current and the committee is assessing the need for and plan to update the forms and potentially expand the number of translated forms. While it appears that few superior courts still utilize the fee waiver process, elimination of the fee waiver in all courts would do much to ensure equal access for LEP individuals to the courts.

#### IV. Individuals who are d/Deaf, Hard of Hearing, or DeafBlind (D/HH/DB)<sup>87</sup>

According to the 2011 American Community Survey, about 3.6% of the U.S. population, or about 11 million individuals, consider themselves d/Deaf or have serious difficulty hearing. In Washington State 3.8% of individuals, or about 290,000 individuals, are classified as having a “hearing difficulty.” This number reflects a broad range of hearing loss, not only individuals who communicate in ASL. This is in part due to the way in which these data are gathered. The U.S. Census and American Community Survey contain questions about a person’s ability to hear. Individuals are asked to indicate if they are d/Deaf or have serious difficulty hearing. One in eight people in the United States aged 12 years or older has hearing loss in both ears, based on standard hearing examinations.<sup>88</sup> Over one-half of the responses indicating difficulty to hear are from individuals age 65 and over. While exact numbers are unknown, Washington State is home

<sup>86</sup> CTR. FOR CT. INNOVATION, *supra* note 57.

<sup>87</sup> This label refers to a diverse community of people who self-identify differently. The term “deaf” generally refers to the condition of not hearing, while “Deaf” is used by a group of people who share a common language (ASL) and culture. Hard of Hearing can refer to a person with hearing loss. The National Association of the Deaf notes that these are the most commonly accepted terms. Each of these labels may imply different language proficiencies and preferences, and each group may face specific barriers to communication. *Community and Culture – Frequently Asked Questions*, NAT’L ASS’N OF THE DEAF (2021), <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions>.

<sup>88</sup> Frank R. Lin, John K. Niparko & Luigi Ferrucci, *Hearing Loss Prevalence in the United States*, 171 ARCHIVES INTERNAL MED. 1851 (2011).

to a thriving and diverse d/Deaf population and is home to the Washington State School for the Deaf in Vancouver, Washington.

## A. Federal law

Individuals who are d/Deaf, Hard of hearing, or DeafBlind (D/HH/DB) have the same constitutional protections outlined above as well as federal protections to access to interpreters under Title II and Title III of the Americans with Disabilities Act (ADA), which requires state and local government agencies (public entities) and private entities open to the public (public accommodations) respectively to provide effective communication so that individuals may access their programs.<sup>89</sup>

Title II of the ADA, which governs state and local governments, provides that, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, activities of a public entity, or be subjected to discrimination by any such entity.”<sup>90</sup> Regulations implementing the ADA require public entities to, “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communication with others.”<sup>91</sup> In this context, “companion” means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

Public entities must provide auxiliary aids and services necessary to provide an equal opportunity to participate in the program or services provided by the public entity.<sup>92</sup> Such aids and services include qualified sign language interpreters.<sup>93</sup> In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.<sup>94</sup> Additionally, a public entity may not require an individual with a

<sup>89</sup> 42 U.S.C. §§ 12132, 12182.

<sup>90</sup> 42 U.S.C. § 12132.

<sup>91</sup> 28 C.F.R. § 35.160 (a)(1).

<sup>92</sup> 28 C.F.R. § 35.160 (b)(1).

<sup>93</sup> 28 C.F.R. § 35.104.

<sup>94</sup> 28 C.F.R. § 35.160 (b)(2).

disability to bring another individual to interpret for them or rely on a minor child to interpret, absent an imminent threat to safety.<sup>95</sup>

Title III of the Americans with Disabilities Act requires public accommodations to provide effective communication to individuals with disabilities. This becomes relevant when discussing services outside the courthouse, such as interactions with family court services, GALs, and CASAs. 42 U.S.C. §§ 12182 (a) states that, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns or operates a place of public accommodation.” Regulations implementing the ADA require places of public accommodation to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities, including to companions who are individuals with disabilities.<sup>96</sup> Similar to the Title II context, places of public accommodation may not require an individual with a disability to bring their own interpreter or rely on a minor child to interpret, except in the instance of an emergency involving an imminent threat to safety.<sup>97</sup>

Federal law also governs the way in which public entities communicate with people with disabilities using telecommunication services. Title IV of the ADA provides that where a public entity communicates by telephone with applicants or beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are d/Deaf or hard of hearing or have speech impairments.<sup>98</sup> Furthermore, Title IV provides that where a public entity uses an automated-attendant system, such as voicemail, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and telecommunications relay systems.<sup>99</sup>

The primary means by which individuals who are D/HH/DB access the telecommunication system is through TTY relay and video relay services. In Washington State, the Department of Social and Health Services’ Office of Deaf and Hard of Hearing (ODHH) oversees Washington Relay.

<sup>95</sup> 28 C.R.F. §§ 35.160 (c)(1), (3).

<sup>96</sup> 28 C.F.R. § 36.303 (c)(1).

<sup>97</sup> 28 C.F.R. §§ 36.303 (c)(2)–(4).

<sup>98</sup> 28 C.F.R. § 35.161.

<sup>99</sup> *Id.*



Washington Relay is designed to connect D/HH/DB and speech disabled individuals with people and businesses that use standard (voice) telephones. Although the relay service has been in existence for more than 18 years, many people don't understand how it works. As a result, people who receive relay calls often hang up, believing the caller is a telemarketer. ODHH has instituted a “Don’t Hang Up” campaign to raise awareness about relay calls and accessibility to telecommunication services for individuals with communication-related disabilities.<sup>100</sup> It’s critical for courts to understand these services and accessibility issues when interacting over the phone with persons with disabilities and to train staff accordingly.

Finally, federal law governs the use of video remote interpreting (VRI) and establishes guidelines for those who use VRI services. DOJ requires entities using VRI to meet all of the following performance standards: real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication; a sharply delineated image that is large enough to display the interpreter’s face, arms, hands, and fingers, and the face, arms, hands, and fingers of the person using sign language, regardless of their body position; a clear, audible transmission of voices; and adequate staff training to ensure quick set-up and proper operation.<sup>101</sup> Having these details spelled out in federal statute reminds us that remote interpreting for D/HH/DB individuals has unique considerations and courts should be aware of these requirements as they implement procedures for ASL interpreter services to be delivered remotely.

## B. Washington State law

As mentioned above, the WLAD<sup>102</sup> provides a right to be free from discrimination because of national origin or the presence of any sensory disability in state government and in places of public accommodation. Additionally, people who are D/HH/DB have the right to interpreter services under chapter 2.42 RCW, which is specific to interpreter services in court. Washington

<sup>100</sup> See *Telecommunication Relay Services*, WASH. STATE DEP’T OF SOC. & HEALTH SERVS., <https://www.dshs.wa.gov/altsa/odhh/telecommunication-relay-services>

<sup>101</sup> 28 C.F.R. § 36.303(d).

<sup>102</sup> RCW 49.60.030.

State secures the constitutional rights of d/Deaf persons and of other persons who, because of impairment of hearing or speech, are unable to readily understand or communicate the spoken English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.<sup>103</sup> Under RCW 2.42.120, the court must appoint and pay for a qualified interpreter to interpret legal proceedings involving D/HH/DB persons or affecting a juvenile under their guardianship. In addition, a D/HH/DB person is provided a qualified interpreter when required to participate in a program or activity ordered by the court as part of sentencing, required as part of a diversion agreement, or required as part of probation or parole.<sup>104</sup>

RCW 2.42.130 requires courts to request a qualified interpreter and/or an intermediary interpreter through a list maintained by ODHH,<sup>105</sup> or through one of Washington’s Deaf Service centers. In addition, the:

...appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the hearing-impaired person, that the interpreter is able in that particular proceeding, program, or activity to interpret accurately all communication to and from the hearing-impaired person. If at any time during the proceeding, program, or activity, in the opinion of the hearing-impaired person or a qualified observer, the interpreter does not provide accurate, impartial, and effective communication with the hearing-impaired person the appointing authority shall appoint another qualified interpreter.<sup>106</sup>

### C. Findings about gender disparities

The communication and language barriers to accessing the courts described throughout this chapter can have impacts across all genders. There are instances in which these impacts are

<sup>103</sup> RCW 2.42.010.

<sup>104</sup> RCW 2.42.120.

<sup>105</sup> *Regional Service Centers*, WASH. STATE DEP’T OF SOC. & HEALTH SERVS., <https://www.dshs.wa.gov/altsa/odhh/regional-service-centers-0>.

<sup>106</sup> RCW 2.42.130(2). Note: use of the term, “hearing-impaired” is used only when referring to specific terminology used in state statute. Throughout the document, where not citing statute, authors use the term Deaf, Hard of Hearing, and DeafBlind.

amplified for people with multiple marginalized identities. This chapter highlights those instances throughout the chapter (or in many cases highlights a gap in the data and research needed to understand those intersections), but some of those gendered impacts are described in more detail here. People who are d/Deaf,<sup>107</sup> especially those with other marginalized identities, face employment challenges in the U.S.: d/Deaf people are less likely to participate in the labor market than are hearing people, with women, Black, American Indian and Alaska Native, and d/Deaf persons with additional disabilities<sup>108</sup> facing even lower participation.<sup>109</sup> For those who do participate in the workforce, d/Deaf Black, Indigenous and women of color experience severe wage gaps, with Latina d/Deaf women being paid 60 cents for each dollar paid to white d/Deaf women. For comparison, white hearing men are paid nearly twice the average salary of Latina d/Deaf women.<sup>110</sup> The resulting economic disparities likely also impact d/Deaf individuals' experiences with law enforcement and courts systems. It is important to acknowledge that datasets which group diverse populations together, such as combining all Asian, Native Hawaiian, and Pacific Islander populations into one category, often masks disparities experienced by populations within that group. So, data such as that just cited is likely an incomplete picture of the individuals most impacted by employment barriers and wage gaps.

Gender disparities may also arise when survivors of IPV and sexual assault who are D/HH/DB access the justice system. Some national research suggests that rates of IPV and sexual assault in people who are D/HH/DB may be higher than in their hearing counterparts. However, the research is not conclusive, and the way that many of these studies are conducted makes it difficult to generalize their findings to the wider D/HH/DB community.<sup>111</sup> The best available,

<sup>107</sup> The source document refers specifically to people who are d/Deaf.

<sup>108</sup> The source document uses the term "deafdisabled."

<sup>109</sup> CARRIE LOU GARBEROGLIO, STEPHANIE CAWTHON & MARK BOND, *DEAF PEOPLE AND EMPLOYMENT IN THE UNITED STATES: 2016* (2016).

<sup>110</sup> *Id.*

<sup>111</sup> For example, some studies group together people who are D/HH/DB with people with all other disabilities. This is the case of the National Intimate Partner and Sexual Violence Survey, which asks if participants have a disability, but does not identify hearing or d/Deaf status. See Matthew J. Breiding & Brian S. Armour, *The Association Between Disability and Intimate Partner Violence in the United States*, 25 *ANNALS EPIDEMIOLOGY* 455 (2015). The National Crime Victimization Survey does report individuals with a hearing disability as a separate group and notes a higher rate of violent crime victimization (15.7 per 1,000) than for individuals without disabilities (12.7 per 1,000). However, these data do not separate out sexual assault and IPV from other violent crimes. See Erika Harrell, *Crime Against Persons with Disabilities, 2009-2015 - Statistical Tables*, STAT. TABLES 17 (2017). Much of the

nationally representative evidence does suggest that rates of IPV are higher in the d/Deaf community than the hearing community.<sup>112</sup> There is a lack of evidence regarding rates of sexual assault in the d/Deaf community compared to the hearing community.

Multiple qualitative studies and anecdotal evidence collected from d/Deaf survivors and service providers across the U.S. find that d/Deaf survivors face barriers to reporting victimization and communicating with law enforcement that are specific to the d/Deaf community. Barriers to reporting include the following:

- Accessing emergency responders: If 911 dispatchers and operators of non-emergency contact lines are not well-versed in using TTY systems, those channels of communication may be inaccessible.<sup>113</sup>
- Challenges communicating with law enforcement: d/Deaf respondents have reported negative interactions with law enforcement in the community due to communication barriers. A needs assessment of the Minneapolis Police Department noted that while the department had written policies and procedures in place for officers to acquire

literature specific to IPV/sexual assault survivors who are d/Deaf has been conducted in post-secondary education settings, and generally finds higher rates of lifetime IPV and sexual assault prevalence in d/Deaf respondents than those reported in the hearing population. See Melissa L Anderson & Irene W Leigh, *Intimate Partner Violence Against Deaf Female College Students*, 17 VIOLENCE AGAINST WOMEN 13 (2011); Teresa Crowe Mason, *Does Knowledge of Dating Violence Keep Deaf College Students at Gallaudet University Out of Abusive Relationships?*, 43 JADARA 19 (2019); Rebecca A. Elliott Smith & Lawrence H. Pick, *Sexual Assault Experienced by Deaf Female Undergraduates: Prevalence and Characteristics*, 30 VIOLENCE & VICTIMS 948 (2015). In addition, data from Washington State suggests that individuals who are D/HH/DB begin and complete Bachelor's degrees at lower rates than hearing individuals, and studies of hearing sexual assault survivors found that non-students reported higher rates of sexual assault than students enrolled in post-secondary education. See CARRIE LOU GARBEROGLIO, STEPHANIE CAWTHON & ADAM SALES, POSTSECONDARY ACHIEVEMENT OF DEAF PEOPLE IN WASHINGTON: 2017 10 (2017); LYNN LANGTON, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 20 (2014). Therefore, prevalence estimates in post-secondary students may be lower than the actual rates in the d/Deaf population. Additionally, studies with d/Deaf students use a variety of methodologies, including using written English or signed ASL, and differences in the ways the questions are asked may lead to variation in results.

<sup>112</sup> A 2014 study with a national sample of Deaf respondents found rates of partner rape other forms of IPV significantly higher than those reported in hearing respondents of the National Violence Against Women Survey. Robert Q Pollard, Erika Sutter & Catherine Cerulli, *Intimate Partner Violence Reported by Two Samples of Deaf Adults Via a Computerized American Sign Language Survey*, 29 J. INTERPERSONAL VIOLENCE 948 (2014). Day et al. found similar rates of IPV in Deaf and hearing respondents, but the authors note that selection bias may have influenced this result. STEFANIE J. DAY, KELSEY A. CAPPETTA & MELISSA L. ANDERSON, A BRIEF REPORT: INTERPERSONAL VIOLENCE EXPOSURE AND VIOLENCE MYTH ACCEPTANCE IN THE OHIO DEAF COMMUNITY 13 (2019).

<sup>113</sup> JENNIFER OBINNA ET AL., UNDERSTANDING THE NEEDS OF THE VICTIMS OF SEXUAL ASSAULT IN THE DEAF COMMUNITY (2005), <https://www.ojp.gov/pdffiles1/nij/grants/212867.pdf>.

interpreters to communicate with d/Deaf individuals, practical barriers remain. For example, d/Deaf respondents who have tried to verbally communicate with law enforcement have reported being mislabeled as drunk or as having a mental illness due to speech patterns.<sup>114</sup> After hours or when an interpreter is not readily available, law enforcement may attempt to communicate with people who are d/Deaf through written English, which may not be an effective mode of communication for the d/Deaf person.<sup>115</sup> (for more on this topic, see section V, Interactions with Law Enforcement).

- Concerns with using interpreters: Deaf communities tend to be small and insular, and if an interpreter is known to the survivor, the survivor may have concerns about confidentiality. If the same interpreter cannot be scheduled for each conversation with investigators, the survivor may find themselves disclosing the assault to multiple members of the d/Deaf and ASL-signing community.<sup>116</sup>
- Identifying IPV tactics: Research into IPV in the d/Deaf community shows that some tactics of intimidation and control are specific to d/Deaf survivors, for example control of electronic communication channels to isolate the victim.<sup>117</sup> Law enforcement, prosecutors, jurors, and judges may not recognize d/Deaf-specific abuse and control tactics as IPV.

Because police rarely show up with an interpreter, data regarding prevalence of victimization of people who are D/HH/DB is likely inaccurate. This means it is unknown whether D/HH/DB survivors experience victimization less often than hearing survivors or simply report victimization less often. Additionally, there is a lack of evidence regarding whether law enforcement gather data on the D/HH/DB status in victim reports. Anecdotal information from advocates serving the D/HH/DB communities indicate that many D/HH/DB survivors fear reporting to law enforcement during a domestic violence or sexual assault incident out of fear it will result in them being

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Michelle S. Ballan et al., *Intimate Partner Violence Among Help-Seeking Deaf Women: An Empirical Study*, 23 VIOLENCE AGAINST WOMEN 1585 (2017); Sheli Barber, Dov Wills & Marilyn J Smith, *Deaf Survivors of Sexual Assault, in PSYCHOTHERAPY WITH DEAF CLIENTS FROM DIVERSE GROUPS* 320 (2010).

<sup>117</sup> NANCY SMITH & CHARITY HOPE, CULTURE, LANGUAGE AND ACCESS: KEY CONSIDERATIONS FOR SERVING DEAF SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE 36 (2015).

arrested. This occurs when the police are only able to communicate with the alleged abuser and the D/HH/DB individual is the one arrested, mistakenly. Anecdotal information also suggests that when law enforcement was not prepared to provide an interpreter, reports of domestic violence went unfiled and uninvestigated. Without accurate data on the prevalence and reporting of sexual assault and IPV crimes against people who are D/HH/DB, it is unknown whether sexual assault or IPV crimes against people who are D/HH/DB are investigated or prosecuted at rates comparable to crimes against hearing survivors.

Survivors report additional barriers to justice within the system. In a study of d/Deaf survivors of IPV, one respondent noted, “The court rooms were difficult and intimidating and were not HOH [hard of hearing] accommodating [SIC]. When I told a judge that I was HOH, his response was ‘I’ll talk louder’. I often left confused and unsure about what was even said. The legal system is not designed to protect victims.”<sup>118</sup> Another respondent reported, “Court and police dropped case because of interpreters.”<sup>119</sup>

As noted above, there is a higher prevalence of IPV and sexual violence among women, (particularly Black, Indigenous and women of color and immigrant women), and LGBTQ+ individuals. D/HH/DB individuals from these populations may experience an amplification of the barriers described here.

#### D. Financial limitations

Chapter 2.42 RCW does not permit the imposition of fees for sign language interpreters on litigants or individuals requesting ASL interpreter services in any legal or quasi-judicial proceeding. The ADA prohibits government entities from charging individuals with hearing loss for the cost of interpreter or other language access, such as Communication Access Real-Time Translation (CART), services. This also applies to interpreting services and written texts provided for D/HH/DB persons participating in court ordered programs and services. Washington State

<sup>118</sup> From an unpublished dissertation on d/Deaf experiences of trauma and PTSD due to domestic violence. Quotes were collected through surveys of female d/Deaf survivors recruited through snowball sampling. Due to safety concerns, it’s unknown if any respondents were located in Washington State. Personal Communication with Kabreanna Tamura (Jan. 18, 2021).

<sup>119</sup> *Id.*

courts utilize the General Rule (GR) 33 request for accommodation forms; however, courts vary in the use of this form, with most courts utilizing an interpreter services request process unique to the court. The use of different systems in courts can lead to confusion, particularly where the court is not equipped or prepared to communicate with D/HH/DB individuals as they navigate the court process.

## E. Limited access to sign language interpreters

Access to qualified interpreters in the context of interpreter services for D/HH/DB individuals brings up different issues than it does for LEP litigants. This is in part because AOC does not certify sign language interpreters and instead relies on the credentialing system created by the national sign language interpreter organization, the Registry of Interpreters for the Deaf (RID). RCW 2.42.110 defines a “qualified interpreter,” as one certified by the state, or is an interpreter certified by RID with the Comprehensive Skills Certificate or the CI/CT certification. However, these RID-issued credentials are no longer available for testing, although an interpreter holding one of these credentials is still considered certified so long as they meet the requirements to maintain their certification.<sup>120</sup> In 1998, the RID created the Specialist Certificate: Legal (SC:L) in recognition by the RID that the majority of sign language interpreters with the Comprehensive Skills Certificate or the CI/IC certification are not qualified, without further training, to interpret in court settings.<sup>121</sup> As a result of that change in view by ASL interpreting professionals, ODHH and the Interpreter Commission developed criteria to create a list of interpreters “certified” by the state in order to create a more appropriately qualified list of interpreters for court hearings. The current administrative rule, WAC 388-818-500, et.seq., provides that court sign language interpreters should hold SC:L national certification from RID, or have passed the written portion of the SC:L exam. However, of 429 certified interpreters listed in the RID in Washington State, only 20 are listed as having the SC:L. ODHH maintains a listing of those qualified court interpreters

<sup>120</sup> *Update on Credentials and Testing: SC:L and OTC*, REGISTRY OF INTERPRETERS FOR THE DEAF, INC. (2021), <https://rid.org/update-on-credentials-and-testing-scl-and-otc>.

<sup>121</sup> *Interpreter Certifications*, NORTHWEST AMERICAN SIGN LANGUAGE ASSOCIATES, INC. (2021), <https://nwasla.com/interpreter-certifications>.

for the courts.<sup>122</sup> Because so few interpreters meet the requirements outlined in the WAC, courts therefore may find it necessary to utilize interpreters who hold national certification as outlined in RCW 2.42.110.

The availability of SC:L credentialed interpreters is becoming limited because RID suspended testing for that certification (SC:L) in June 2016.<sup>123</sup> This means that as of 2016, Washington State has very limited ability to add any interpreters to the list of those qualified to interpret in courts under the procedures identified by AOC and ODHH. As attrition reduces the number of previously certified interpreters, there is a growing shortage of ASL interpreters available to the courts. No action has been taken to address this issue within Washington courts, however, the Interpreter Commission has begun to raise the issue as one of concern for Washington courts.<sup>124</sup>

Litigants who are both d/Deaf/HH and blind may have additional barriers to accessing courts. In part, this is due to the limited number and location of sign language interpreters who are trained to interpret for DeafBlind persons. Many DeafBlind individuals communicate through tactile or protactile sign language.<sup>125</sup> There is no formal certification process for interpreters working in these modalities. ODHH follows the practice recommended by the DeafBlind Service Center, as a subject matter expert, and honors their recommendations on who is qualified. The DeafBlind Service Center has identified approximately fifty interpreters in the State of Washington who are qualified to interpret tactile and/or protactile sign language. Geographical location is an important factor in access as, out of 51 listed interpreters, 30 are located in King County, and all are west of the Cascades.<sup>126</sup> Only three of those listed are also listed by RID as having the SC:L certification. The RID registry also does not currently have an option to search for interpreters

<sup>122</sup> WAC 388-818-510. The ODHH list can be found at:

<https://fortress.wa.gov/dshs/odhhapps/Interpreters/CourtInterpreter.aspx>.

<sup>123</sup> *Certifications Under Moratorium*, REGISTRY OF INTERPRETERS FOR THE DEAF, INC. (2021), <https://rid.org/rid-certification-overview/certifications-under-moratorium>.

<sup>124</sup> INTERPRETER COMM'N MEETING, WASH. CTS., MEETING MINUTES FROM FEBRUARY 14, 2020 (2020), [https://www.courts.wa.gov/content/publicUpload/Interpreters\\_Meeting%20Materials/20200214\\_m.pdf](https://www.courts.wa.gov/content/publicUpload/Interpreters_Meeting%20Materials/20200214_m.pdf).

<sup>125</sup> Tactile sign language is when the DeafBlind person puts a hand on top or below the signer's movements so that a deafblind person can feel the movement of the signs and communicate. Protactile sign language is a developing language that provides environmental visual cues as coded information relayed to the DeafBlind person by touching their leg, back, shoulder or arm in specific ways.

<sup>126</sup> *Tactile and Close Vision Interpreters and Rates*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS., <https://www.dshs.wa.gov/altsa/odhh/tactile-and-close-vision-interpreters-and-rates>.



with tactile and/or protactile sign language ability.<sup>127</sup> To identify a tactile and/or protactile interpreter with SC:L certification, one would have to cross-reference both lists. The low number of qualified interpreters in many areas of the state, and barriers to identifying them, may lead to delays in acquiring interpreters for these individuals. Additionally, the low-incidence of DeafBlind individuals interacting with courts and courts encountering DeafBlind litigants, may cause additional barriers.

Litigants who are foreign-born and D/HH/DB with limited English language skills, may also face additional barriers to accessing interpreter services in courts. If they are required to complete a form requesting interpreter services, those forms are not translated nor provided in an accessible format, such as Large Print or Braille or with form completion instructions provided in ASL via video. Courts are challenged in providing resources to file an interpreter request in an accessible format, including making online requests, and this causes delays in getting a hearing scheduled.<sup>128</sup>

Courts are required to provide an “intermediary interpreter, otherwise known as a “Certified Deaf Interpreter (CDI)” if the D/HH/DB client is not readily interpretable by an interpreter who uses the dialect of ASL standardly taught in interpreter training programs.<sup>129</sup> A CDI is trained to identify and communicate with non-standard forms of ASL.<sup>130</sup> The CDI is, by definition, a Deaf individual and likely a native user of ASL. The CDI works as a team with a hearing sign language interpreter to provide communication access to individuals who have non-standard sign language, including individuals who are foreign born, communicate in “home signs,” or those with mental health or cognitive disabilities. Either the deaf party or the ASL interpreter can inform the court of the need for the CDI.<sup>131</sup> Increasingly, use of a CDI is becoming standard procedure in other parts of the country to ensure effective communication for complex legal proceedings and

<sup>127</sup> *Search Page*, REGISTRY OF INTERPRETERS FOR THE DEAF, <https://myaccount.rid.org/Public/Search/Member.aspx>.

<sup>128</sup> Information provided by court administrators to AOC staff.

<sup>129</sup> RCW 2.42.140, RCW 2.42.140. The term “intermediary” is codified at RCW 2.42.140, but it is an outdated term. The role is now referred to as a qualified or Certified Deaf Interpreter (DI or CDI).

<sup>130</sup> CARLA MATHERS, NAT’L CONSORTIUM OF INTERPRETER EDUC. CTRS., BEST PRACTICES AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN COURT AND LEGAL SETTINGS 23, 38 (2009), <http://www.diinstitute.org/wp-content/uploads/2012/06/Best-Practices-Legal-Interpreting.pdf>.

<sup>131</sup> RCW 2.42.140.

matters. A quick internet search found guidelines on CDI use from courts in California, Maryland, and New Jersey, among others.<sup>132</sup> However, this is a fairly new practice for most courts, and courts may not understand the role of the ASL interpreter in relation to the CDI, how to access CDI interpreters, and how to conduct a hearing with both an ASL interpreter and a CDI.

As noted above in the section on LEP, D/HH/DB individuals may find courts unprepared to provide them communication access for “ex parte” hearings. Or, in areas with low availability of interpreters, people who are D/HH/DB may face delays and rescheduled hearings if a certified or registered interpreter is not available when needed. VRI services are one alternative, which allows the interpreter to be located remotely; however, there are special considerations when using VRI services for D/HH/DB court participants. Contrary to LEP users, where the end user may join only by phone because they lack the necessary equipment to join by video, sign language is a visual language, and all parties utilizing the interpreter service must have adequate video and audio to participate in a remote interpreted event. This requires the use of broadband internet, extensive court staff training on the use of VRI, and additional considerations such as additional disabilities that render video interpreting inaccessible. Video remote interpreting is happening not only in situations where the interpreter is located remotely, but also where the hearing itself is being held remotely and all or most parties are appearing from a remote location. This is an increasingly common practice during the COVID-19 pandemic, addressed below in section VIII, subsection B: Remote access to information through court websites.

## F. Incarceration

The Americans with Disabilities Act and Rehabilitation Act of 1973 applies to jails and prisons.<sup>133</sup> D/HH/DB individuals in prison are entitled to reasonable accommodations or modifications to program policies to allow them to have equal access to programs, services and activities. Despite the legal requirements to provide access, D/HH/DB individuals incarcerated in jails or prisons have multiple communication needs. Many d/Deaf individuals in prison experience prolonged communication deprivation, referred to as being a, “prison within a prison,” that leads to mental

<sup>132</sup> Use of CDI in Courts Search, GOOGLE, <https://www.google.com/> (search “use of CDI in courts”).

<sup>133</sup> 29 U.S.C. § 701 et seq.

health conditions.<sup>134</sup> They need to be able to contact individuals on the outside, including legal representatives and friends and family. They need to communicate effectively with correctional officers and staff, in order to express needs, follow instructions, and stay safe in case of an emergency. They need to communicate in order to access services in the facility such as education, rehabilitation, and work opportunities. They need to communicate with fellow incarcerated individuals in order to enjoy social stimulation and avoid isolation.<sup>135</sup>

Bureau of Justice Statistics data show that D/HH/DB individuals are over-represented in the incarcerated population nationally: 6.2% of people incarcerated in state and federal prisons and 6.5% of people incarcerated in jails reported having a “hearing disability,” compared to 2.6% of the non-incarcerated population.<sup>136</sup> These data are not disaggregated by gender. The Washington State Department of Corrections does not publish data on disabilities, so it is unclear how many people incarcerated in prisons who are D/HH/DB may be facing communication barriers while incarcerated in Washington.

Disability Rights Washington’s Amplifying Voices of Inmates with Disabilities (AVID) project conducted a series of visits to county jails across the state in 2016 to assess compliance with DOJ requirements for communication accessibility. They conclude that “no county jail in Washington comes close to meeting” those requirements.<sup>137</sup> Based on their observations at the time, they report that most jails had limited communication access technology, primarily old TTY (text telephone) machines packed away in boxes or not in working order. AVID notes that TTY is no longer the preferred communication method for individuals who primarily communicate with ASL, as TTY requires communication in written English.<sup>138</sup> The use of TTY for communications among D/HH/DB persons has greatly decreased since the inception of the Video Relay Service (VRS) platform, which allows individuals to use ASL with an ASL interpreter through a video connection to place phone calls. The lack of phone access and reliance on TTYs is highly

<sup>134</sup> TALILA A. LEWIS, HELPING EDUCATE TO ADVANCE THE RIGHTS OF THE DEAF (HEARD), DEAF IN PRISON FACT SHEET (2014), <https://behearddc.org/wp-content/uploads/2018/11/DeafInPrison-Fact-Sheet-.pdf>.

<sup>135</sup> N.R. Schneider & Bruce D. Sales, *Deaf or Hard of Hearing Inmates in Prison*, 19 DISABILITY & SOC'Y 77 (2004).

<sup>136</sup> JENNIFER BRONSON & MARCUS BERZOFKY, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12 13 (2015).

<sup>137</sup> DAVID CARLSON, ACCESS DENIED: CONDITIONS FOR PEOPLE WITH PHYSICAL AND SENSORY DISABILITIES IN WASHINGTON’S COUNTY JAILS (2017).

<sup>138</sup> *Id.*

problematic and seriously impacts a D/HH.DB person's ability to make a phone call. This is especially impactful if their personal cell phone is taken from them at the time of arrest and the law enforcement entity cannot locate a working TTY or provide access to VRS with a laptop computer that has pre-installed software to call a VRS provider. This has serious consequences for a single parent who is D/HH/DB: there is no way they can call a relative to take care of their children or family member while they are in jail.<sup>139</sup> Washington Department of Corrections' current policy on telephone use simply states that, "Individuals with hearing and/or speech disabilities, and those who wish to communicate with parties who have such disabilities, will have access to a TTY/TDD or VRS."<sup>140</sup> It's unclear which, or how many, state facilities currently allow access to VRS. Disability Rights Washington's observations are now several years out of date, and there is a lack of current data regarding availability of VRS in county and local jails.

In a series of interviews with d/Deaf individuals who had experienced incarceration (some in Washington State), and with service providers, respondents noted that access to interpreters inside correctional institutions was limited, meaning they might be left without an interpreter on the weekends.<sup>141</sup> Respondents reported a lack of important accommodations like vibrating alarm clocks, closed-captioning on T.V., and interpreters or other services to allow them to participate in education or employment.<sup>142</sup> This last issue is supported by quantitative data: a national survey of incarcerated individuals showed that those with a hearing disability were 24% less likely to use work assignments while incarcerated. The authors note that this is especially concerning given the literature showing that access to programs, education and work opportunities can reduce offender recidivism.<sup>143</sup> There is a lack of evidence regarding access to prison programs and opportunities by gender.

<sup>139</sup> Personal communication with Washington State Department of Social and Health Services, Office of Deaf and Hard of Hearing staff on June 23, 2021.

<sup>140</sup> STEPHEN SINCLAIR, TELEPHONE USE BY INCARCERATED INDIVIDUALS 10 (2019), <https://www.doc.wa.gov/information/policies/files/450200.pdf>.

<sup>141</sup> Kabrianna Tamura & Elaine Gunnison, *Hearing on the Deaf Penalty: the Intersections of Deafness and Criminal Justice*, 7 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 123 (2019).

<sup>142</sup> *Id.*

<sup>143</sup> Jennifer M. Reingle Gonzalez et al., *Disproportionate Prevalence Rate of Prisoners with Disabilities: Evidence from a Nationally Representative Sample*, 27 J. DISABILITY POL'Y STUD. 106 (2016).

## G. Interactions with court clerks and other personnel

As noted above, the unscheduled nature of interactions with court clerks means that there may not be interpreting services available when D/HH/DB individuals arrive to file pleadings, to address a court matter, to seek legal remedy or protections, and to respond to ongoing matters. While courts have GR 33 processes and ADA coordinators, it is unknown the extent to which those programs apply to the operations within the clerk's offices themselves. It's also unknown which court clerk's offices in Washington State have bilingual staff, telephonic or video interpreting systems, or contracts with interpreters or translators. For D/HH/DB individuals, this would likely mean either video remote interpreter services or in-person interpreter services to allow d/Deaf individuals access to effective communication in their interactions with the court clerk. It's also unknown which court clerk's offices have these services in place or how they meet the communication needs of D/HH/DB individuals.

D/HH/DB individuals are entitled to a court-funded interpreter to access court ordered programs or activities.<sup>144</sup> This includes family court services and court-ordered diversion programs. D/HH/DB individuals may face barriers in accessing these services and when working with court-appointed GALs or CASAs, who may lack the procedures for requesting an interpreter or be unaware of how to work with interpreters. Anecdotal reports indicate a common practice that happens in some courts is for a court to waive the requirement for a party where the court would otherwise have to provide an interpreter for the litigant to participate. This occurs in family law cases for the parenting seminar, for example. One advocate observed a judge waive the required parenting class for a DeafBlind parent instead of arranging for interpreter services. In interactions with GALs, the lack of interpreter services can result in fewer interactions with D/HH/DB parties and an over-reliance on individuals involved for whom there are no communication barriers.

In criminal cases, where diversion programs are an option, it is not clear how available those programs are to individuals in languages other than English, which may be a barrier for D/HH/DB individuals' participation due to interpretation needs. This process of the court foregoing participation in court ordered programs undermines the intention behind referring people to

<sup>144</sup> RCW 2.42.110.

these services. There is a lack of evidence to document how frequently this practice might occur and what impacts there might be by gender.

## H. Court observers and family participation

In addition to the Washington State Constitution, Article 1, Section 10, regarding open courts addressed in the LEP context, persons with disabilities have the right to interpreter services when they are companions to a person involved with the justice system, as jurors, and as court observers. The ADA requires courts to provide accommodations to persons with disabilities when needed to participate as a juror. In addition, covered entities, at times, communicate with someone other than the person who is receiving their goods or services. As discussed above, the ADA refers to such people as “companions.”<sup>145</sup> The obligation to furnish auxiliary aids and services extends to companions who are individuals with disabilities, whether or not the individual accompanied is also a person with a disability.<sup>146</sup>

Advocates report that some courts are providing interpreter services for d/Deaf and Hard of Hearing jurors and court observers, such as family members of a litigant. The full extent to which courts around Washington provide these services is unclear, but the legal requirement to do so is clear.

## I. Impact of language impairments on systems knowledge

Language impairments include a wide spectrum of challenges and abilities in verbal and written communication. They may stem from learning and developmental disabilities, fetal alcohol spectrum disorder, traumatic brain injury, or low or reduced language acquisition from reduced language exposure during critical developmental periods.<sup>147</sup> Language impairments can manifest as difficulties with a variety of tasks such as verbal processing and comprehension, verbal expression, reading and writing, and understanding cultural, social, and contextual

<sup>145</sup> 28 CFR § 35.160(a)(2). A “companion” is “a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.” *Id.*

<sup>146</sup> 28 CFR § 35.160 (b)(1).

<sup>147</sup> Michael LaVigne & Gregory Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders*, 15 U.C. DAVIS J. JUV. L. & POL'Y 37 (2011).

communication rules (referred to in the literature as “pragmatic skills”).<sup>148</sup> More than 90% of D/HH/DB children are born to hearing families, which often means that the child and parent do not share language in common at the time of the child’s birth.<sup>149</sup> Research shows that this can lead to language acquisition delays because even though the child may be educated in the U.S., comprehension and understanding are complicated by language acquisition delays unique to D/HH/DB children and hearing children of parents whose primary language is ASL. This has resulted in a noticeable gap in understanding of legal concepts and processes among D/HH/DB community members, and misunderstandings by courts in the capability of those persons to be prudent decision-makers, especially in situations where custody determinations are before the court.

Individuals with diagnosed language disabilities have a legal right under WLAD to accommodations to allow them full enjoyment of their legal rights and services. However, individuals with language impairments, but no recognized disability, may not be offered accommodations. The consequences of language impairment can be serious, as language impairment negatively affects a person’s ability to understand the criminal or juvenile justice process, to communicate with counsel, to understand and comply with terms of bond or community custody, to complete programming successfully, and ultimately, to lead productive lives.<sup>150</sup> Decades of social science research from across the U.S. suggests that the population of youth and adults involved in the criminal justice system has a higher rate of language impairments than the general population.<sup>151</sup> In Washington State, youth involved in the juvenile

<sup>148</sup> *Id.*

<sup>149</sup> Ross E. Mitchell, Michaela Karchmer, *Chasing The Mythical Ten Percent: Parental Hearing Status of Deaf and Hard of Hearing Students in the United States*, 4 SIGN LANGUAGE STUD. 138 (2004).

<sup>150</sup> LaVigne & Rybroek, *supra* note 147, at 44.

<sup>151</sup> See, e.g., Stavroola A.S. Anderson, David J. Hawes & Pamela C. Snow, *Language Impairments Among Youth Offenders: A Systematic Review*, 65 CHILDREN & YOUTH SERVS. REV. 195, 200 (2016) (a systematic review of 17 articles published 1982-2016 in USA, UK and Australia found a “strong association between youth offending and language impairments” in verbal comprehension, verbal expression and “pragmatic skills”); Jonathan A. Berken, Elizabeth Miller & Deborah Moncrieff, *Auditory Processing Disorders in Incarcerated Youth: A Call for Early Detection and Treatment*, 128 INT’L J. PEDIATRIC OTORHINOLARYNGOLOGY 109683 (2020) (a test of auditory processing in 52 incarcerated adolescents found that 17.3% met the threshold for auditory processing disorder, compared to an estimated prevalence of 2-7% in the general adolescent population); ELIZABETH GREENBERG, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 170 (2003) (the last nationwide adult literacy prison survey found lower average literacy in the incarcerated adult population compared to the nonincarcerated adult population); Amy E. Lansing et al., *Cognitive and Academic Functioning of Juvenile*

justice system have higher rates of special education eligibility, and worse performance on standardized reading tests, than their peers.<sup>152</sup> Very little of the research on language impairments includes data analyzed by gender. However, the aggregated data suggest that female youth and adults with language impairments, in the absence of identified disabilities, may face steep barrier to communication and full exercise of their rights in the justice system, relative to females without these impairments.

Language impairments can affect youth and adults at multiple stages of criminal justice involvement, potentially limiting their understanding of their rights as presented in Miranda warnings;<sup>153</sup> the requirements of conditional release or probation;<sup>154</sup> the terms and collateral consequences of a guilty plea;<sup>155</sup> or simply engaging in effective communication with their defense lawyer or the judge.<sup>156</sup> Additionally, treatment and services accessed through the justice

*Detainees: Implications for Correctional Populations and Public Health*, 20 J. CORR. HEALTH CARE 18 (2014) (among a sample of 1,829 court-involved youth in Cook County who took vocabulary and oral reading tests, all performed below the area average and nearly one quarter of the group qualified as having a “major impairment” in receptive verbal skills).

<sup>152</sup> CARL McCURLEY, ANDREW PETERSON & ALEX KIGERL, STUDENTS BEFORE AND AFTER JUVENILE COURT DISPOSITIONS (2017), [https://www.courts.wa.gov/subsite/wscrr/docs/Education%20and%20Juv%20Ct%20Dispositions\\_finalrev.pdf](https://www.courts.wa.gov/subsite/wscrr/docs/Education%20and%20Juv%20Ct%20Dispositions_finalrev.pdf). In 2017, WSCCR found special education eligibility rates of 24% in youth with juvenile court dispositions, and 32% in youth sentenced to probation or juvenile rehabilitation; meanwhile, 39% of youth with juvenile court dispositions had met the reading standard for their grade level, compared to 66% of their peers.

<sup>153</sup> Anne Marie Lieser, Denise Van der Voort & Tammie J. Spaulding, *You Have the Right to Remain Silent: The Ability of Adolescents with Developmental Language Disorder to Understand Their Legal Rights*, 82 J. COMMUN DISORDERS 105920 (2019). A group of 40 non-court-involved youth, half with developmental language disorder, were tested on Miranda Rights comprehension; 75% of those with developmental language disorder scored below “sufficient” understanding, compared to 30% of youth without developmental language disorder, even when controlling for IQ. *Id.*

<sup>154</sup> ROSA PERALTA ET AL., WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING IN JUVENILE COURT (2012). The Judicial Colloquies Project demonstrated that Washington Courts standard forms on adjudication and disposition are written in language that is very hard to understand—even the forms for use in juvenile justice. *Id.* More detail on the Judicial Colloquies Project can be found in section V, subsection D: Youth.

<sup>155</sup> “Chapter 13: Prosecutorial Discretion and Gendered Impacts” discusses evidence from studies finding that youth understand very little about the terms of plea bargains and the rights they give up when they take plea bargains.

<sup>156</sup> Pamela C. Snow, *Speech-Language Pathology and the Youth Offender: Epidemiological Overview and Roadmap for Future Speech-Language Pathology Research and Scope of Practice*, 50 LANGUAGE, SPEECH, & HEARING SERVS. SCHS. 324 (2019). A 2019 review of the literature on Development Language Disorder in youth offenders noted that adults unfamiliar with developmental language disorder can easily misinterpret signals of low comprehension as instead representing behavioral problems, lack of motivation and noncompliance. *Id.*



system (or mandated by the justice system) may involve some level of verbal therapy or participation to be effective.<sup>157</sup>

## J. Efforts to address disparities and recommendations

A small, qualitative study was conducted in the San Francisco Bay Area to assess the outcomes of a two-hour cultural competency training for law enforcement officers responding to d/Deaf victims of domestic violence.<sup>158</sup> Results were mixed: participants reported high overall satisfaction with the training, noting the prior misconceptions they had held regarding communication with d/Deaf individuals. However, they also expressed a desire for further education. Participants also reported lower confidence in their ability to respond to d/Deaf victims; perhaps, as the authors note, because participants hadn't been as aware of potential language challenges before the training.<sup>159</sup>

One Washington county has a model program for individuals who use ASL. King County's Emergency Sign Language Interpreter Program (ESLIP) provides an on-call interpreter for "emergency and time sensitive situations on a 24 hour a day basis, 365-days-a-year." The county retains the services of a sign language interpreter on call who is dispatched to an encounter with the police or for other legal matters. Other legal situations include seeking protection orders and initial meetings with an attorney prior to arraignment.<sup>160</sup> It is unknown if there are similar services in any other county in Washington. In their review of Washington's county jails, AVID highlighted Pierce County for providing video relay technology to incarcerated d/Deaf individuals who use ASL, noting that this was an exception among jails.<sup>161</sup>

Respondents to a qualitative study on D/HH/DB incarcerated individuals conducted in several states (including Washington) recommended public awareness training on d/Deaf communication for justice system staff as a whole. Respondents to the study also recommended

<sup>157</sup> Lansing et al., *supra* note 151; Snow, *supra* note 156.

<sup>158</sup> Alina Engelman & Julianna Deardorff, *Cultural Competence Training for Law Enforcement Responding to Domestic Violence Emergencies With the Deaf and Hard of Hearing: A Mixed-Methods Evaluation*, 17 HEALTH PROMOTION PRAC. 177 (2016).

<sup>159</sup> *Id.*

<sup>160</sup> *Emergency Sign Language Interpreter Program (ESLIP)*, KING CNTY. OFF. OF CIV. RTS. & OPEN GOV'T (2014), <https://www.kingcounty.gov/~media/exec/civilrights/documents/ESLIPpublic.ashx?la=en>.

<sup>161</sup> CARLSON, *supra* note 137.

hiring an individual who is d/Deaf-aware and who can function as an on-site ADA representative in prisons, jails, courts, and other spaces and can advocate on behalf of D/HH/DB individuals' rights. Respondents noted that D/HH/DB individuals were often unaware of procedures to report mistreatment or lack of access when institutionalized, suggesting a lack of systems in place to ensure ADA compliance in correctional facilities.<sup>162</sup>

## V. Interactions with Law Enforcement

Police observations, interactions, and reports can end up being a critical part of a criminal case. When those observations and reports are with LEP or D/HH/DB individuals, many of the same factors already mentioned can create a disparate impact on the outcome. *Miranda v. Arizona* states that a suspect must knowingly and voluntarily waive their rights to silence and to an attorney, but it does not specify a standard to ensure that suspects fully understand their rights as read to them. Numerous assessments over the years and across the country have demonstrated that often, Miranda rights as read by law enforcement are worded in a way that is difficult to understand, using uncommon vocabulary and complex sentence structure,<sup>163</sup> and that suspects commonly do not fully understand verbal warnings.<sup>164</sup> As noted above, this puts anyone whose native language is not English at a disadvantage. Even native English speakers may struggle to understand Miranda warnings, and certain individuals may be particularly disadvantaged, including individuals with other language impairments, mental illness, cognitive disabilities, low literacy levels, and youth.<sup>165</sup>

<sup>162</sup> Tamura & Gunnison, *supra* note 141.

<sup>163</sup> Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007).

<sup>164</sup> Michael Rendall & Ken MacMahon, *Influences on Understanding of a Verbally Presented Police Caution Amongst Adults Involved in the Criminal Justice System: A Systematic Review*, PSYCHIATRY, PSYCH. & L. 1 (2020).

<sup>165</sup> Morgan Cloud et al., *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002); Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390 (2008); Gwyneth C. Rost & Karla K. McGregor, *Miranda Rights Comprehension in Young Adults with Specific Language Impairment*, 21 AM. J. SPEECH LANGUAGE PATHOLOGY 101 (2012); Wszalek, *supra* note 1.

## A. Individuals with LEP

Title VI of the Civil Rights Act of 1964 applies to law enforcement in the same way it applies to courts. Law enforcement agencies which receive any money from the federal government must provide meaningful access to all services and programs provided by the agency. The kind of language services needed depend on the importance of the interaction. In situations where law enforcement is conducting a facility tour for the public or engaging in a community event, volunteer interpreters may be allowed; however, in law enforcement activities where accuracy is very important, such as an interrogation or arrest, law enforcement should ensure competent interpreter services.<sup>166</sup>

Despite the longstanding legal obligation, immigrants with LEP may face barriers when interacting with law enforcement in emergency situations. Lee et al. conducted a national survey of service providers regarding the police response to immigrant crime victims, including some in Washington State.<sup>167</sup> Service providers reported that when police responded to incidents of domestic violence against female immigrants, language barriers created substantial barriers to safety for those victims. In some cases police failed to take a report because of an inability to communicate with the victim, or spoke to only to the suspected perpetrator in English, or used children of the victim or perpetrator to interpret.<sup>168</sup>

People who have LEP may face language barriers when being interrogated by the police. For example, officers may over-estimate a suspect's ability to understand English, and foreign-born suspects may not know they have the right to an interpreter. Researchers report that some individuals may show high proficiency in conversational English but struggle with the complex legal language commonly used in Miranda warnings. Pavlenko et al. demonstrated this challenge in a 2019 study with undergraduate students studying in U.S. universities.<sup>169</sup> Only 10% of native

<sup>166</sup> Federal Guidance at 67 Fed. Reg. 117 at 41469.

<sup>167</sup> NATALIA LEE ET AL., NATIONAL SURVEY OF SERVICE PROVIDERS ON POLICE RESPONSE TO IMMIGRANT CRIME VICTIMS, U VISA CERTIFICATION AND LANGUAGE ACCESS 42 (2013).

<sup>168</sup> *Id.*

<sup>169</sup> Aneta Pavlenko, Elizabeth Hepford & Scott Jarvis, *An Illusion of Understanding: How Native and Non-Native Speakers of English Understand (and Misunderstand) Their Miranda Rights*, 26 INT'L J. OF SPEECH, LANGUAGE & L. (2019).

English speakers fully understood spoken Miranda warnings. Among foreign-born students studying in English alongside native English speakers (a group who can be assumed to use English proficiently), none understood fully. Thirteen percent did not understand the Miranda warnings at all. Even more worrying, non-native English speakers consistently overestimated their own understanding, often substituting words that sounded similar to words that they misunderstood to create an “illusion of understanding.”<sup>170</sup> This finding raises the question as to whether even proficient non-native English speakers are able to fully understand their rights during a police interrogation.

Finally, law enforcement officers sometimes ask bilingual officers or other bilingual individuals to act as interpreters if they speak the same language as an individual with LEP who is being questioned or interrogated. This practice comes with some risks, including when the interpreter is not sufficiently fluent in the language or where they are not sufficiently neutral. It is generally recognized courts should not make use of a biased interpreter during trial proceedings. Whenever possible, an interpreter should be entirely disinterested.<sup>171</sup> However, whether a person is too interested in a proceeding to be qualified as an interpreter is ordinarily within the discretion of the trial court.<sup>172</sup> In law enforcement interactions, using a bilingual police officer as an interpreter comes with risks. For example, in *People v. Aguilar-Ramos*, the court found that a Spanish-speaking defendant was not adequately advised of his Miranda rights by the police during a custodial interrogation due to the detective’s lack of proficiency in Spanish.<sup>173</sup> The defendant was unable to understand his rights and therefore he did not knowingly and intelligently waive his Miranda rights. Additionally, there is risk in using other individuals as interpreters, where the individual is not deemed to be sufficiently neutral. For example, in *State v. Cervantes*, the court held that “[i]f it is fundamentally unfair for a trial court to appoint a biased interpreter in a courtroom setting, it cannot be less unfair for police to use a potential co-defendant as an interpreter.”<sup>174</sup>

<sup>170</sup> *Id.*

<sup>171</sup> 21 C.J.S. Courts § 141, at 216 (1940).

<sup>172</sup> *State v. Bell*, 57 Wn. App. 447, 455, 788 P.2d 1109 (1990).

<sup>173</sup> *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo. 2004)

<sup>174</sup> *State v. Cervantes*, 62 Wn. App. 695, 814 P.2d 1232 (1991)

Merely speaking the language may not be a sufficient qualification for a police officer to provide accurate interpretation. A study conducted in Australia compared the accuracy of interpretation of police interrogation between untrained bilingual English/Spanish speakers and trained interpreters. The bilingual speakers performed much worse than trained interpreters in every area, and the authors concluded that “bilingualism alone does not guarantee competent interpreting.”<sup>175</sup> The authors note that true interpreting is not word-to-word translation, but involves conveying the tone, meaning and subtext of a message, and in the case of legal interpreting, the correct use of legal terminology. The study found that trained interpreters outperformed untrained bilingual individuals not only in accuracy of the interpreted speech, but also in use of correct interpreting protocols and accuracy of speech manner.<sup>176</sup> Use of qualified, trained interpreters matters, as errors in interpretation can have devastating legal implications for the person being interviewed or interrogated.<sup>177</sup> Of note, the Seattle Police Department manual instructs officers to “request an employee who speaks the person’s native language” before using telephone interpreting services.<sup>178</sup>

## B. Individuals who are D/HH/DB

Under the ADA, local and state government agencies, including law enforcement, are required to give equal access to and communicate equally with persons who are D/HH/DB.<sup>179</sup> The DOJ has pursued multiple complaints against police departments across the country for failure to comply with this obligation, including a recent settlement with the Whatcom County Sheriff’s Office.<sup>180</sup> Despite the legal obligation to do so, many law enforcement agencies are unprepared to

<sup>175</sup> Sandra Hale, Jane Goodman-Delahunty & Natalie Martschuk, *Interpreter Performance in Police Interviews. Differences Between Trained Interpreters and Untrained Bilinguals*, 13 INTERPRETER & TRANSLATOR TRAINER 107, 121 (2019).

<sup>176</sup> *Id.* Similar results have been found in other non-U.S. settings. There is a lack of evidence on this topic in the U.S.

<sup>177</sup> SUSAN BERK-SELIGMAN, *COERCED CONFESSINS: THE DISCOURSE OF BILINGUAL POLICE INTERROGATIONS* (2009). Berk-Seligman conducted a review of 112 appellate cases from California, New York and Florida and found that police officers were routinely used as Spanish-English interpreters during investigation and interrogation, and have even been called to testify about their interpretation. *Id.*

<sup>178</sup> “Use the Voiance for interpreting if a Department employee is not available to translate.” *Seattle Police Department Manual, 15.250 – Interpreters and Translators*, SEATTLE.GOV (May 7, 2019), <https://www.seattle.gov/police-manual/title-15---primary-investigation/15250---interpreters/translators>.

<sup>179</sup> 28 CFR § 35.130.

<sup>180</sup> DEP’T OF JUST., *supra* note 76. See also *Police Interactions with Deaf Persons*, 3 AELE MONTHLY L. J. 101 (2009), <https://www.aele.org/law/2009all03/2009-03MLJ101.pdf> (compilation of settlement agreements).

effectively communicate with D/HH/DB individuals. According to the National Association of the Deaf, “the vast majority of law enforcement receive either no training at all or only perfunctory training.”<sup>181</sup>

The lack of communication access in law enforcement interactions can lead to miscommunications and, at times, is associated with use of deadly force. For example, in 2017, Magdiel Sanchez, a deaf man, was shot and killed by police after he failed to comply with oral commands by the officer to drop a short metal pipe he had in his hands. This happened after a neighbor informed the police that Mr. Sanchez was d/Deaf.<sup>182</sup> In another publicized instance in Tacoma, Washington, a d/Deaf woman who called the police to report an assault was tased and arrested by the responding officers without an interpreter present, despite having reportedly identified herself as d/Deaf during her 911 call.<sup>183</sup> When she sought damages in a lawsuit, a federal jury agreed that her civil rights had been violated by the officers.<sup>184</sup> While there is a lack of systematic data on this topic, a recent qualitative study with female d/Deaf survivors of domestic violence provides anecdotal accounts of these interactions presenting a barrier to reporting or access to justice. Two respondents out of a group of 22 noted not being able to receive needed police protection. One respondent noted, “Police came many times but he would act normal and I would be frozen. They didn’t have patience to speak with me.”<sup>185</sup>

Elements of law enforcement interactions which may seem routine for some, present serious language access challenges for D/HH/DB individuals. For example, the simple practice of handcuffing a d/Deaf person who signs has the result of silencing them.<sup>186</sup> In the Whatcom County Sheriff’s Office settlement agreement, the county agreed to handcuff all persons who are

<sup>181</sup> Amiel Fields-Meyer, *When Police Officers Don’t Know About the ADA*, ATLANTIC (Sept 26, 2017), <https://www.theatlantic.com/politics/archive/2017/09/the-steadily-problematic-interactions-between-deaf-americans-and-police/541083>.

<sup>182</sup> *Id.*

<sup>183</sup> BENRO OGUNYIPE, NAT’L BLACK DEAF ADVOCATES, INC., PUBLIC STATEMENT ON INVESTIGATION INTO THE BATTERY AND ARREST OF LASHONN WHITE (2012), [https://www.nbda.org/EE/files/NBDA\\_Statement\\_on\\_Investigation\\_into\\_Battery\\_and\\_Arrest\\_of\\_Lashonn\\_White.pdf](https://www.nbda.org/EE/files/NBDA_Statement_on_Investigation_into_Battery_and_Arrest_of_Lashonn_White.pdf).

<sup>184</sup> John Knically, *Jury Agrees Deaf Woman’s Rights Violated, but Refuses Huge Payout*, KIRO 7 NEWS (Mar. 19, 2014), <https://www.kiro7.com/news/jury-agrees-deaf-womans-rights-violated-refuses-hu/81795935/>.

<sup>185</sup> Tamura, Kabrianna and Elaine Gunnison. *Deafness and Trauma: A preliminary investigation of trauma in Deaf domestic violence survivors*. Unpublished dissertation, Seattle University (2020).

<sup>186</sup> Tamura & Gunnison, *supra* note 141.

d/Deaf or hard of hearing in front of their body, unless there is a reasonable safety risk.<sup>187</sup> D/HH/DB individuals may also need an interpreter in order to fully understand their Miranda rights. Simply presenting them in written English isn't sufficient for D/HH/DB individuals who have limited English proficiency.<sup>188</sup> This again ties into the concepts addressed in this chapter regarding the lack of systems awareness for some D/HH/DB individuals.

### C. Individuals with cognitive disabilities

Data from the Bureau of Justice Statistics national inmate survey shows that individuals with cognitive disabilities are over-represented in the incarcerated population: 19.5% of people in state and federal prisons have cognitive disabilities, compared to 4.8% of the general population.<sup>189</sup> These data indicate marked gender disparities: 30.3% of women in state and federal prisons have a cognitive disability, compared to 18.7% of men; and 41.2% of women in local jails report a cognitive disability, compared to 29.4% of men in local jails.<sup>190</sup> These data only present binary gender data, which prohibits analysis for gender non-binary and other gender-nonconforming individuals. Incarceration data is also generally presented based on the facility where someone is housed (e.g., female and male facilities) rather than based on their actual gender identity. See “Chapter 11: Incarcerated Women in Washington” and Section V of the full report (“2021 Gender Justice Study Terminology, Methods, and Limitations”) for more information on the limitations of incarceration data as well as information on transgender individuals being housed in facilities that do not align with their gender identity.

Some cognitive disabilities relating to language impairments may not be noticeable in conversation, but do impact individuals' understanding of complex sentences with uncommon vocabulary words—such as Miranda warnings. In a small study with 34 high-functioning adults with specific language impairments, researchers found that those individuals had a poorer comprehension of Miranda rights than had been found in peers with a similar level of education,

<sup>187</sup> DEP'T OF JUST., *supra* note 76.

<sup>188</sup> *Id.*

<sup>189</sup> BRONSON & BERZOFKY, *supra* note 136.

<sup>190</sup> *Id.*

and that the majority could not be said to have fully understood their rights as read to them in a verbal warning.<sup>191</sup>

## D. Youth

The U.S. literature on youth interrogations shows that 85 to 90% of juveniles waive their Miranda rights. An assessment of 122 juvenile Miranda warnings collected from jurisdictions across the country showed that the majority of the warnings required at least a 6<sup>th</sup> grade reading level, with some sections requiring up to a grade 13 reading level.<sup>192</sup>

The Washington Judicial Colloquies Project was developed to address low comprehension among youth involved in the juvenile justice system.<sup>193</sup> The project worked with experts and youth in different regions of the state to 1) identify areas where comprehension was lacking, and 2) to develop communication tools for judges to use during hearings to ensure that youth fully understand conditions of release, dispositions, and conditions of probation. These tools include scripts for verbal communication and written forms that use plain language and simple formatting, including checklists. For example, rather than the phrase “appearing in court as required,” which many youth took to refer to their physical appearance (how they were dressed), youth suggested the phrase “you have to come to court when you’re told to.” The Colloquies were piloted in Benton-Franklin and Clark County district courts, as well as in other states, including Delaware, Florida, Massachusetts, and more.<sup>194</sup> It is not clear whether the Colloquies are currently in use in any Superior Courts in Washington State.

## E. Efforts to address disparities and recommendations

In 2017, The King County Sheriff’s Office made substantial changes to the Miranda warnings to be used with juveniles to facilitate their understanding and ability to make an informed choice

<sup>191</sup> Rost & McGregor, *supra* note 165.

<sup>192</sup> Rogers et al., *supra* note 163.

<sup>193</sup> ROSA PERALTA ET AL., WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING IN JUVENILE COURT (2012).

<sup>194</sup> Personal Communication with George Yeannakis and Rosa Peralta (April 30, 2021).



about their rights.<sup>195</sup> The Seattle City Council went further in August 2020, passing a law prohibiting law enforcement from questioning youth without providing legal counsel.<sup>196</sup>

## VI. Bias Against Individuals Speaking English with Non-Native Accents, Regional Accents, or Vernacular in The Courts, or Those Speaking Through an Interpreter

### A. Use of vernacular and accented English

Rachel Jeantel was a childhood friend of Trayvon Martin and a leading witness for the prosecution in the trial of George Zimmerman for Martin's death. Jeantel testified for nearly six hours during the trial but her testimony was reportedly never mentioned during jury deliberations nor taken into account in the jury's decision to acquit Zimmerman.<sup>197</sup> After the trial, one juror reported that Jeantel was both "hard to understand" and "not credible." Jeantel had spoken in African American Vernacular English, a vernacular form of English recognized by linguists as having consistent grammatical rules and pronunciations, but that is stigmatized in non-Black society.<sup>198</sup>

There is a substantial body of research on the impact of the use of vernacular Aboriginal English in Australian courts, and in some cases, courts there and in the UK have allowed the use of vernacular interpreters for witnesses who communicate primarily in a vernacular or creole version of English.<sup>199</sup> Additional studies found that accented speech was "rated less truthful than native speech," and that people wrongly attribute, "the difficulty of understanding the speech to the truthfulness of the statement."<sup>200</sup> Therefore, accented speech was negatively associated

<sup>195</sup> *Sheriff's Office Simplifies Miranda Warnings for Juveniles*, KING CNTY. SHERIFF'S OFF. (2017), <https://www.kingcounty.gov/depts/sheriff/news-media/news/2017/September/Miranda-warnings-simplified-for-juveniles.aspx>.

<sup>196</sup> Council Bill 119840, Ordinance No. 126132, <https://seattle.legistar.com/LegislationDetail.aspx?ID=4606197&GUID=11CA0994-A2A6-4283-A63A-01003E95BB22&Options=ID%7CText%7C&Search=119840>.

<sup>197</sup> John R. Rickford & Sharese King, *Language and Linguistics on Trial: Hearing Rachel Jeantel (and Other Vernacular Speakers) in the Courtroom and Beyond*, 92 LANGUAGE 948 (2016).

<sup>198</sup> Taylor Jones et al., *Testifying While black: An Experimental Study of Court Reporter Accuracy in Transcription of African American English*, 95 LANGUAGE e216 (2019).

<sup>199</sup> Rickford & King, *supra* note 197.

<sup>200</sup> Shiri Lev-Ari & Boaz Keysar, *Why Don't We Believe Non-Native Speakers? The Influence of Accent on Credibility*, 46 J. EXPERIMENTAL SOC. PSYCH. 1093 (2010).

with truthfulness. These biases can impact the litigant or witness' credibility without some intervention to address the hidden bias or to bolster creditably.

One example of accent bias comes from the experiences of Indigenous individuals. The study of Native American English, or what is referred to in research as a "reservation accent," "occurs in indigenous communities regardless of whether a heritage language is spoken; and that through English, indigenous people are creating and maintaining their own ethnic identities."<sup>201</sup> During the 19<sup>th</sup> and 20<sup>th</sup> centuries, the federal government often forcibly removed Indigenous children from their families and placed them in boarding schools. Federal boarding schools only allowed the children to speak English in an attempt to eradicate Indigenous languages.<sup>202</sup> Dennis Banks shared his recollections of being in a boarding school during the 1930s and 1940s: "...forced haircuts during which we'd be shaven bald, the slaps on the wrists by wooden rulers when we spoke Indian languages..."<sup>203</sup>

Researchers believe this may be where the reservation accent stems from as children during this timeframe were speaking English with similar intonations went home to their communities. Later, as some Indigenous people moved from their reservations to cities, intertribal communities were created which may have further reinforced the reservation accent.<sup>204</sup> Anecdotal information shared by community members indicates that when Indigenous individuals who have a "reservation accent" are in encounters with law enforcement, store owners, and others in authority positions, their accent can draw a negative reaction from those persons, including speculation that they are in this country illegally or are more likely to commit a crime, or they become the object of derision due to the way they speak. While some people can codeswitch (change their language, inflection, tone, and vocabulary to match the dominant

<sup>201</sup> Tristan Ahtone, *Talk on the Rez: English Prosody and the Native American Accent*, IN THESE TIMES (Mar. 8, 2017), <https://inthesetimes.com/article/talk-on-the-rez-english-prosody-and-the-native-american-accent>.

<sup>202</sup> *Id.*; Jon Reyhner, *American Indian Boarding Schools: What Went Wrong? What Is Going Right?*, 57 J. AM. INDIAN EDUC. 58 (Spring 2018).

<sup>203</sup> Reyhner, *supra* note 202, at 59. It is outside of the scope of this chapter to fully present the problematic history of boarding schools and the impacts on Indigenous communities, but there is substantive scholarship on this topic.

<sup>204</sup> Ahtone, *supra* note 201.

society's expectations), it isn't easy for everyone and the pressure to do this may lead to feeling a rift with one's authentic self, depression, and anxiety.<sup>205</sup>

## B. Interpreter credibility and undermining the credibility of a witness/litigant

The lack of understanding by the court of the interpreting process can lead to communication barriers for clients and harm their credibility. The misunderstanding is that there are direct translations for words in English and other languages. Courts often implore interpreters to provide a “verbatim, word-for-word translation or interpretation.” Courts and attorneys are looking for consistency in responses; however, interpreters using different word choices when translating from the client's language into English can impact this. While the LEP person may be using the same phrasing or signs, the interpreter may “voice” a different word or phrase to convey the meaning of that phrase or sign. This is because in many languages, there is no verbatim “translation,” but instead, interpreters work on providing a message that has an equivalent meaning. If the interpreter, or if different interpreters over the course of time, use a different phrase or word choice, the LEP individual is at risk of being accused of inconsistent testimony and their credibility as a witness can be called into question. In addition, many court-certified interpreters speak English with an accent and one must be concerned that accent bias (discussed above) by attorneys, the court, or jurors can undermine the credibility of the interpretation by the interpreter, or worse, the credibility of the speaker whose utterances are interpreted. If an interpreter utters a sentence in grammatically incorrect English, though the utterance may make sense in context, there is always the risk that because it was not stated in “standard English,” it will be taken as less credible information. Scholars have argued that the concept of “standard English” is in fact a myth, and that even the use of this term normalizes the misperception that there is one form of correct English rather than recognizing and normalizing linguistic diversity.<sup>206</sup>

<sup>205</sup> Angelique Georges, *Exploring Communicative Adaptations of Minority Status Individuals: An Overview of Code Switching Literature*, 12 PERSPECTIVES 1 (2020).

<sup>206</sup> ABIGAIL LANE, NORMALIZING INCLUSION: THE STANDARD ENGLISH MYTH (2012), [https://www.colorado.edu/pwr/sites/default/files/attached-files/abigail\\_lane\\_standard\\_english\\_myth\\_normalizing\\_inclusion\\_divconf\\_2012.pdf](https://www.colorado.edu/pwr/sites/default/files/attached-files/abigail_lane_standard_english_myth_normalizing_inclusion_divconf_2012.pdf); ROSINA LIPPI-GREEN, *The Standard Language Myth*, in ENGLISH WITH AN ACCENT 55, 55–65 (1997).

Additionally, implicit bias and a lack of cultural competency may create additional barriers for LEP and d/Deaf clients as they interact with courts and court systems. Many LEP and d/Deaf individuals have different cultural backgrounds that may not include familiarity with the U.S. legal system. Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions. Implicit bias happens on the unconscious level and can come up in cases where LEP and d/Deaf individuals are involved. Research into cultural competency issues in courts is an important component of this work, as is learning about the ways in which implicit bias may impact legal proceedings involving the use of interpreter services.<sup>207</sup>

## VII. Barriers and Facilitators to Communication for Individuals with Disabilities that Impede Functional Speech

Some individuals with disabilities such as cerebral palsy or severe autism may have little or no functional speech and may use alternate methods or assistive technologies to communicate (known as Augmentative and Alternative Communication, or AAC). The same protections under the ADA would require courts to find an appropriate accommodation to facilitate this communication; however, this often depends on awareness of different auxiliary aids and services and an openness of the legal system to providing these services. Such auxiliary aids and services, including assistive speech technology, are important for people with disabilities to exercise their legal rights. The literature shows that people with disabilities are disproportionately likely to be victims of crime: for example, women with a disability are more likely to report experiencing IPV including sexual violence and physical violence,<sup>208</sup> and individuals who use AAC are more likely than the general population to be the victims of abuse.<sup>209</sup> Moreover, individuals with limited or no functional speech also face barriers in accessing justice. Barriers may include: 1) challenges reporting the crime to police and participating in the

<sup>207</sup> LANE, *supra* note 206.; LIPPI-GREEN, *supra* note 206.

<sup>208</sup> Breiding & Armour, *supra* note 111.

<sup>209</sup> Leanne Togher et al., *Development of a Communication Training Program to Improve Access to Legal Services for People with Complex Communication Needs*, 26 TOPICS LANGUAGE DISORDERS 199 (2006).

investigation;<sup>210</sup> 2) if the case goes to trial, challenges to the individual's credibility as a witness or their capacity to testify because of their use of AAC technology;<sup>211</sup> or 3) concerns about facilitated communication (when a person with speech ability aids the individual communicating using AAC).<sup>212</sup>

There is a lack of research and data regarding the experiences of people with limited functional speech and their interactions with various actors in the legal system, and whether there are disproportionate impacts by gender.

## VIII. Promising Practices for Improving Communication and Language Access

### A. Plain language

Self-representation in civil cases has become increasingly common: the National Center for State Courts reports that in 76% of civil cases, at least one litigant was self-represented.<sup>213</sup> According to data from 2001, 65% of family law litigants in Washington State represent themselves in court (pro se).<sup>214</sup> There are many reasons why litigants may represent themselves in court, but evidence from other states indicates that the high cost of legal representation may be one.<sup>215</sup> This barrier is likely to disproportionately affect women, especially Black, Indigenous and women of color, sexual and gender minorities, immigrant women, and women with disabilities, who face greater economic hardship due to lower wages, less labor force participation, concentration in

<sup>210</sup> Mary Oschwald et al., *Law Enforcement's Response to Crime Reporting by People with Disabilities*, 12 POLICE PRAC. & RSCH. 527 (2011).

<sup>211</sup> Diane Nelson Bryen & Christopher Wickman, *Ending the Silence of People with Little or No Functional Speech: Testifying in Court*, 31 DISABILITIES STUD. Q. (2011).

<sup>212</sup> Togher et al., *supra* note 209.

<sup>213</sup> PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (2015).

<sup>214</sup> Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 49 (2013).

<sup>215</sup> NATALIE ANNE KNOWLTON ET AL., *CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT* (2016), [https://iaals.du.edu/sites/default/files/documents/publications/cases\\_without\\_counsel\\_research\\_report.pdf](https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf).

low-wage sectors, and high costs of child care and other family expenses.<sup>216</sup> See “Chapter 1: Gender and Financial Barriers to Accessing the Courts” for more information on populations most impacted by wage gaps and poverty and for research on programs to address financial barriers to legal representation.

Legal language is complex and difficult for many people to understand.<sup>217</sup> Pro se litigants may struggle to fill out documents and forms needed for their case. The U.S. Supreme Court’s decision in *Turner v. Rogers* recognized the challenge that pro se litigants face.<sup>218</sup> However, the right to counsel appointed by the court for low-income persons primarily exists in the context of criminal cases.<sup>219</sup> No such right exists in most civil cases. Recognizing that many individuals will be unrepresented in civil matters, the Washington State Access to Justice Board, the Washington State AOC, and the Washington State Office of Administrative Hearings launched the Pro Se Project to create an online self-help center with guides, plain-language documents, checklists, and more tools to help pro se litigants navigate the legal process.<sup>220</sup> This project could benefit all pro se litigants, with particular benefits for pro se litigants unable to afford legal representation. While the first step of the Pro Se Project was to translate family court forms into plain language, it is unclear what the current status of this project is, or if any effort was made to evaluate outcomes for pro se litigants.

The use of plain language is also relevant in jury instructions. Multiple states have begun a process to create jury instruction forms that use simplified, non-legal language in an attempt to help jurors make informed decisions with an accurate understanding of the relevant law.<sup>221</sup>

<sup>216</sup> M V LEE BADGETT, SOON KYU CHOI & BIANCA D M WILSON, LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 47 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>; CYNTHIA HESS & JESSICA MILLI, THE STATUS OF WOMEN IN WASHINGTON: FORGING PATHWAYS TO LEADERSHIP AND ECONOMIC OPPORTUNITY 33 (2015), <https://wawomensfdn.org/wp-content/uploads/2020/07/ReportStatusofWomeninWA.pdf>.

<sup>217</sup> *Wszalek*, *supra* note 1.

<sup>218</sup> *Dyer et al.*, *supra* note 214.

<sup>219</sup> *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

<sup>220</sup> *Id.*

<sup>221</sup> *Jury Instructions*, PLAIN LANGUAGE, <https://plainlanguage.gov/examples/brochures/jury-instructions>.

Washington’s civil and criminal pattern jury instructions have been “translated” into plain language whenever possible, and trial judges and attorneys are encouraged to use them.<sup>222</sup>

## B. Remote access to information through court websites

It is becoming increasingly important for individuals to be able to access information about the legal system and courts on the internet. In the 2019 ‘State of the State Courts’ survey, 68% of respondents reported that they would search for information about state courts directly from the state court website. Among respondents under 50 years old, the percentage increased to 72%. Over half of the under-50 respondents also noted they would be likely to search for and trust information on their state courts on the court’s official social media account.<sup>223</sup> However, simply having a website does not automatically ensure access. For example, some websites can be difficult to navigate and make it hard for individuals to access the information they need. In the 2017 ‘State of the State Courts’ survey, 80% of respondents noted that easier navigation of court websites would have a positive impact on their experience.<sup>224</sup> State court websites should be made accessible to people with disabilities, formatted to be accessed with assistive technology such as screen readers or voice recognition software.<sup>225</sup> Additionally, making websites mobile-enabled improves access for individuals who primarily access the internet from a phone. The evidence shows that young adults; Black, Indigenous and people of color; individuals without a college degree and those with lower household income who own smartphones are more likely to say that their phone is their primary source of internet access.<sup>226</sup> Hawaii, Maryland, Michigan and Florida are examples of states using ‘responsive design’ to make their courts websites mobile-friendly.<sup>227</sup> When accessed in August of 2020, the Washington State

<sup>222</sup> See *Washington Pattern Jury Instructions*, WESTLAW, <https://govt.westlaw.com/wccji/Index>.

<sup>223</sup> GBAO STRATEGIES, STATE OF THE STATE COURTS SURVEY ANALYSIS, 2019 (2020), <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2019-state-of-state-courts-survey>.

<sup>224</sup> GBAO STRATEGIES, 2017 STATE OF THE STATE COURTS - SURVEY ANALYSIS (2018), <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/2017-state-of-state-courts-survey>.

<sup>225</sup> U.S. DEP’T OF JUST.; CIV. RTS. DIV.; DISABILITY RTS. SECTION, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES (2003), [https://www.ada.gov/websites2\\_scrn.pdf](https://www.ada.gov/websites2_scrn.pdf).

<sup>226</sup> Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW RSCH. CTR. (Apr. 13, 2012), <https://www.pewresearch.org/internet/2012/04/13/digital-differences>; Eric Tsetsi & Stephen A. Rains, *Smartphone Internet Access and Use: Extending the Digital Divide and Usage Gap*, 5 MOBILE MEDIA & COMM’N 239 (2017).

<sup>227</sup> ROBERT GREACEN, EIGHTEEN WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS (2018).

Courts website did not appear to be mobile enabled. Facilitating access to information about the courts and legal system can increase access for all, especially low-income individuals and Black, Indigenous, and people of color.

Translating court websites, or information contained within a website, into commonly used languages is another important element of accessibility. Many courts in Washington have very little translated information on their court website. Many others rely on machine translation tools to automatically translate the website content, but studies show that machine translation tools fail to provide accurate translations comparable to human translators, even with recent developments in the technology.<sup>228</sup> For example, in Yakima County, where 97% of the population with LEP speak Spanish,<sup>229</sup> the Yakima County District Court has a machine translate option available. Information about the availability of interpreter services was not readily accessible in translation, nor was information about how to file an interpreter complaint.<sup>230</sup> The King County Superior Court website has a link on the main index to ‘Interpreter Services,’ and noted that interpreter services are available at no cost for all court events; but the information there is only provided in English.<sup>231</sup> For mandatory forms and pattern forms, The Washington State Courts website has some important forms available in commonly used languages like Spanish, Russian, Chinese, Korean, and Vietnamese; however, when visited in August 2020, translation of forms was ongoing, and the titles of the forms on the Spanish page were listed only in English, with download instructions and important information about low-cost legal representation also only in English.<sup>232</sup>

COVID-19 has complicated communication between incarcerated defendants or represented clients and their defense attorneys. There are fewer in-person visitation opportunities, and the

<sup>228</sup> YONGHUI WU ET AL., GOOGLE’S NEURAL MACHINE TRANSLATION SYSTEM: BRIDGING THE GAP BETWEEN HUMAN AND MACHINE TRANSLATION, [https://arxiv.org/pdf/1609.08144.pdf%20\(7\).pdf](https://arxiv.org/pdf/1609.08144.pdf%20(7).pdf).

<sup>229</sup> This figure is according to the 2015 American Community Survey. STATE OF WASHINGTON (ACS 2015), [https://www.lep.gov/sites/lep/files/resources/WA\\_cnty\\_LEP.ACS\\_5yr.2015.pdf](https://www.lep.gov/sites/lep/files/resources/WA_cnty_LEP.ACS_5yr.2015.pdf)

<sup>230</sup> These are factors measured by the Justice Access index from the National Center for Access to Justice. See *Language Access – 2016*, NAT’L CTR. FOR ACCESS TO JUST. (2021), <https://ncaj.org/state-rankings/2016/language-access>.

<sup>231</sup> OFF. OF INTERPRETER SERVS. (OIS), <https://www.kingcounty.gov/courts/superior-court/interpreter-services.aspx>.

<sup>232</sup> *Español Formularios*, WASH. CTS., <https://www.courts.wa.gov/forms/?fa=forms.static&staticID=19&language=Spanish>.



transition to video visit makes it difficult to have confidential communication.<sup>233</sup> In December 2020, 17% of surveyed attorneys said they had been unable to communicate with at least some of their in-custody clients. Moreover, the transition to remote hearings has been rocky, with defense attorneys reporting some positive and some challenging experiences. Remote hearings can make it more challenging for defense attorneys to communicate confidentially with their clients during hearings, unless breakout rooms are enabled.<sup>234</sup>

The COVID-19 pandemic has made remote access to information all the more important, as in-person visits to courts have been suspended in many areas. The Washington State Board for Judicial Administration Court Recovery Task Force conducted a survey in September 2020 to understand how courts are adapting their practice to the COVID-19 pandemic. They found that 78% of the courts surveyed reported using remote platforms for hearings, and many of those also continued to conduct in-person hearings or provided other technological support for people without internet access. Language access accommodations vary: while 71% of courts provided interpreters during remote hearings, only 34% provided interpreters for break-out discussions (such as between a litigant and their lawyer), and 34% translated written materials.<sup>235</sup> It is unclear what impact the COVID-19 pandemic has had on language barriers for users accessing the courts.

## IX. Recommendations

- To improve access to interpreter services for people with limited English Proficiency (LEP) and d/Deaf, Hard of Hearing, and DeafBlind individuals in legal proceedings and court services and programs, stakeholders should convene to do the following:

<sup>233</sup> JOHNSON & SCHWARTZ, *supra* note 62. A total of 296 defense attorneys from 34 counties in Washington State responded to a survey in December 2020 about the impact of COVID-19 on their work. *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> BJA COURT RECOVERY TASK FORCE LESSONS LEARNED COMMITTEE, CHANGING COURT PRACTICES AMIDST COVID AND BEYOND (2020), [https://www.courts.wa.gov/programs\\_orgs/pos\\_bja/Final%20Changing%20Court%20Practices%20Admist%20COVID%20Survey%20summary.pdf](https://www.courts.wa.gov/programs_orgs/pos_bja/Final%20Changing%20Court%20Practices%20Admist%20COVID%20Survey%20summary.pdf).

- Review accessibility – at all levels of court – by limited English language users statewide, including people with hearing loss, to court interpreting services, and develop an action plan to address identified barriers.
- Suggest procedures to monitor and enforce the requirement that each court develop and annually maintain a language access plan pursuant to RCW 2.43.090; address whether the Washington Administrative Office of the Courts (AOC) needs to increase staffing within the Interpreter Services Program to assist courts in creating and implementing their language access plans and in making their language access plans accessible electronically.
- Address the establishment of interpreter training programs in Washington, partnering with other state agencies and community colleges, to create dedicated language interpretation programs and to provide resources to develop new interpreters in the wide variety of languages we need to meet the language interpretation needs of government programs.
- AOC should partner in the development of a certification program for American Sign Language (ASL) court interpreter certification.
- To improve access to the courts for those with limited English proficiency, the Washington Pattern Forms Committee should help translate key court information and forms into our state’s top 37 languages (per the Office of Financial Management). To that end, the Committee should: (1) create a list of vital documents (including civil protection order requests and other court forms, information about language services, directions on how to access court in-person and remotely, etc.), and (2) determine how to make them most accessible to the people who need them. With regard to translating forms that trigger court action after filing (such as requests for protection orders), we suggest a pilot project in selected counties to test the feasibility of different approaches to gaining court action based on such translated documents.
- AOC should create guidance for and offer assistance to Washington courts in creating and maintaining accessible websites, including translations and disability accommodations.

- AOC should determine how best to acquire language data on LEP parties, witnesses, etc. from Superior, District, and Municipal courts, to enable AOC to identify and address gaps in language services delivery.